
**NAILAH K. BYRD**
**CUYAHOGA COUNTY CLERK OF COURTS**
**1200 Ontario Street**
**Cleveland, Ohio 44113**

## Court of Common Pleas

**BRIEF**
**March 23, 2017 16:54**

By: ROBERT E. DEROSE 0055214

Confirmation Nbr. 1021749

STEVEN SCHMITZ ET AL

CV 14 834486

vs.

**Judge:** DEENA R. CALABRESE

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, ET AL

**Pages Filed:** 130

**IN THE COURT OF COMMON PLEAS CUYAHOGA COUNTY, OHIO**

| | | |
|---|---|---|
| **ESTATE OF STEVEN T. SCHMITZ and YVETTE SCHMITZ, individually and as Fiduciary of Estate of Steven T. Schmitz, Deceased,** | : | **Case No. CV-14-834436** |
| **Plaintiffs,** | : | |
| **v.** | : | **Hon. Deena R. Calabrese** |
| **NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, and UNIVERSITY OF NOTRE DAME,** | : | |
| **Defendants.** | : | |
| **YVETTE SCHMITZ AS FIDUCIARY OF ESTATE OF STEVEN T. SCHMITZ,** | : | **Case No. CV-17-875751** |
| **Plaintiff,** | : | |
| **v.** | : | **Hon. Joan C. Synenberg** |
| **NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, AND UNIVERSITY OF NOTRE DAME,** | : | |
| **Defendants.** | : | |

**PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO CONSOLIDATE AND TO COORDINATE DEFENDANTS' TIME TO RESPOND TO THE COMPLAINTS**

Plaintiffs respectfully submit this response to the Motion to Consolidate filed by Defendants University of Notre Dame du Lac ("ND") and National Collegiate Athletic Association ("NCAA") (collectively "Defendants"). Defendants' Motion seeks not just to

consolidate two cases,[1] but to delay discovery in the wrongful death case, filed on February 10, 2017. For the reasons set forth below, Plaintiffs respectfully request that both Courts deny the Defendants' Motion to Consolidate, at this time, but allow Defendants a reasonable extension of time to file their answers to Plaintiffs' Complaint in the wrongful death case.

## I. SUMMARY OF ARGUMENT

Plaintiffs respectfully request that the Courts deny Defendants' Motion to Consolidate for the following reasons:

1. The personal injury case against Defendants has been ongoing for nearly three (3) years with no discovery. With their Motion, Defendants seek to tie the schedule of Plaintiff's newly filed wrongful death case to the personal injury case, currently the subject of a Petition for Jurisdiction to the Supreme Court of Ohio filed by Defendants. If granted, the Motion to Consolidate will limit Plaintiff's ability to pursue discovery in support of the wrongful death case for an undetermined period of time, which will effectively result in undue delay, and it will unfairly limit Plaintiff's access to justice.

2. Proceeding with discovery (particularly written discovery) in the wrongful death case now will enhance efficiency in both cases. It will move the wrongful death case forward without delay and avoid prejudice to the Plaintiffs. It will create efficiencies in the personal injury case as well. If and when the personal injury case returns to this Court, some discovery

[1] The cases are numbered CV 14-834486 and CV 17-875751. The original personal injury case was first filed in Federal Court in June of 2014 (*see* Exhibit A) and then re-filed by agreement of the parties (*Schmitz v. National Collegiate Athletic Association, et al.*, Case Number CV 14-834486) in the Court of Common Pleas Cuyahoga County, Ohio on October 20, 2014 (hereinafter "the personal injury case"). The personal injury case was dismissed without opinion by the trial court. The Eighth District Court of Appeals reversed with an opinion (attached as Exhibit B), and Defendants filed a petition for jurisdiction to the Supreme Court of Ohio on January 20, 2017. Plaintiffs have opposed that Petition. Plaintiffs filed the wrongful death case in this Court (hereinafter "the wrongful death case") on February 10, 2017. At the filing of this Response, the time for Defendants to file answers has lapsed. Plaintiffs do not oppose a reasonable extension of time for Defendants to answer, and actually granted an extension. On the grounds of efficiency and fairness, Plaintiffs oppose consolidation at this juncture.

common to both cases may already be completed, and Plaintiffs may only need to seek discovery unique to the personal injury case (which has many counts, including, for example, counts of fraud and fraudulent concealment) that may (or may not) apply in the wrongful death case. Certainly, Plaintiffs will support consolidation at that time. This approach will serve the Court's interests of efficiency and judicial economy. Also, it will avoid extended delay and the consequential prejudice to Plaintiffs. It will not prejudice Defendants at all.

3. Additional delay unquestionably prejudices Plaintiffs and advantages Defendants. After nearly three years, consolidating the wrongful death case with a case currently subject to Defendants' Petition for Jurisdiction may delay the wrongful death case and Plaintiffs' right to discovery. The timeline is unclear. Depending on the decision by the Supreme Court regarding jurisdiction, the delay could involve weeks, but it could also involve years. There is no good reason to prejudice Plaintiffs in this way and create an undue advantage for Defendants, particularly in light of the fact that Plaintiffs' discovery rights in the personal injury case have been delayed for nearly three years already.

## II. PROCEDURAL HISTORY

The personal injury case arises from the latent brain disease Steve Schmitz developed late in life. *See* Exhibit C, Plaintiffs' First Amended Complaint at ¶¶ 19-20.

Until age 56, Steve Schmitz led a normal and successful life. He married the same woman he dated in high school, fathered two children with his wife, put them through college, and held a job for a trucking firm all of his adult life. *See* Exhibit C at ¶¶ 12 and 19.

At age 57, he was diagnosed by the Cleveland Clinic Neurology Department with a combination of Chronic Traumatic Encephalopathy ("CTE") and Alzheimer's Disease. *See* Exhibit C at ¶ 20.

Eighteen (18) months after his diagnosis at the Cleveland Clinic, Steve Schmitz filed the original case against the Defendants in Federal Court on June 26, 2014. *See* Exhibit A.

By agreement of the parties, Plaintiffs withdrew the first filing without prejudice and re-filed the same case in this Court. Dkt. 14-834486 (October 20, 2014). Plaintiffs amended the Complaint once. Dkt. 14-834486 (February 9, 2015).

The Trial Court dismissed the Amended Complaint without an opinion (Dkt. 14-834486 (September 1, 2015)), and Plaintiffs appealed. By inference, the Trial Court's order to dismiss appeared to be based on the statute of limitations.

During the pendency of the appeal, and less than two (2) years after receiving his diagnosis at the Cleveland Clinic, Steve Schmitz died at age 59. The Certificate of Death notes CTE as a cause. *See* Exhibit D.

On appeal to the Eighth Appellate District, the Trial court's Order of dismissal was affirmed in part, reversed in part, and remanded on December 8, 2016. *See* Exhibit B, the Eighth Appellate District's December 8, 2016 Journal Entry and Opinion No. 103525.

On January 20, 2017, Defendants filed a Petition asking the Supreme Court of Ohio to grant jurisdiction in this case, and Plaintiffs opposed that Petition on February 21, 2017. *See* Exhibits E and F.

With the personal injury case pending in the appellate courts since September 2015, Plaintiffs filed the wrongful death action on February 10, 2017. Dkt. 17-875751 (February 10, 2017).

Defendants filed the instant Motion to Consolidate on March 10, 2017.[2] Dkt. 14834486 (March 10, 2017).

## III. ARGUMENT

In the interest of fairness and efficiency, and to avoid further needless delay, Plaintiffs oppose consolidation at this time.

Under Ohio Rule of Civil Procedure 42(A),

> (1) *Generally*. If actions before the court involve a common question of law or fact, the court **may**:
>
> > (a) join for hearing or trial any or all matters at issue in the actions;
> >
> > (b) consolidate the actions; or
> >
> > (c) **issue any other orders to avoid unnecessary cost or delay**.

(emphasis added). Similarly, Local Rule 15(H) provides,

> Pursuant to Civil Rule 42, when actions involving a common question of law and fact are pending in this Court, upon motion by any party, the Court . . . **may** order all or some of the actions consolidated; and, it **may make such orders concerning proceedings as may tend to reduce unnecessary costs or delay**.

(emphasis added).

Thus, upon a motion for consolidation, the Court may issue any order concerning proceedings that may reduce unnecessary delay. In this case, denial of consolidation *at this time* is appropriate for precisely that reason.

[2] Prior to Defendants filing their Motion to Consolidate, counsel for Plaintiffs and Defendants corresponded via e-mail. Plaintiffs granted extensions of time to respond to the wrongful death case. Later, the parties corresponded regarding Defendants' intention to file a Motion to Consolidate. *See* Defendants' Exhibit 3. Counsel for Plaintiffs informed Defendants that Plaintiffs oppose consolidation of the cases at this time and that once the Supreme Court of Ohio rules, consolidation may be appropriate. *See id.* Counsel for Plaintiffs further informed Defendants' counsel, "In the meantime, we see no reason the wrongful death claim cannot proceed with discovery while we await the Supreme Court's ruling on the personal injury claim." *Id.*

Plaintiffs' opposition to consolidation is based solely on efficiency and their desire to reduce further delay in discovery. Plaintiffs acknowledge that the wrongful death case is related to and has the same or similar common operative facts as the original case. However, for reasons of fairness and efficiency, consolidation is not appropriate at this time, precisely because it will tie all scheduling in the wrongful death case to that of the personal injury case. Under those circumstances, discovery in the wrongful death case will have to await a ruling in the Supreme Court, which could be weeks or it could be years. That will prejudice Plaintiffs by delaying discovery and their access to justice. It will allow Defendants to extend the existing delay for an indefinite time period, which could be considerable depending on how and when the Supreme Court addresses Defendants' Petition regarding jurisdiction.

Defendants claim that consolidation of the two cases at this time "will facilitate more just and efficient prosecution" of the claims. The effect of consolidation, however, will be to delay even further Plaintiffs' access to justice and the prosecution of a serious claim. With consolidation, neither case will move forward until the Supreme Court has rendered a ruling.

The personal injury case Plaintiffs filed against Defendants has been ongoing for nearly three (3) years without discovery. Throughout that matter, all parties have readily and professionally granted each other extensions of time, including most recently extensions of time to answer the wrongful death complaint. *See* Defendants' Exhibit 3. However, with their Motion to Consolidate, Defendants do not merely seek an extension of time – they seek to delay the wrongful death case and discovery for an indefinite period.

Denial and deferral of consolidation at this juncture will permit the discovery process to begin in the wrongful death case, some of which may be independent of the personal injury case, and some of which may be co-extensive. Broadly, both cases seek information about common

questions, including, but not limited to what Defendants knew about the short-term and long-term medical risks to football players from repetitive head impacts, when they knew it, and what they did about it. Fairness and efficiency will be served by allowing discovery to proceed in the wrongful death case, because it will supply answers to many of the questions also posed in the personal injury case.

This matter is complex. Given the extensive nature of the discovery required, proceeding now with discovery (particularly written discovery) in the wrongful death case will enhance efficiency in both cases. To the extent there is overlap in the discovery required for both cases, efficiency is best served if discovery starts now. If the personal injury case is remanded to this Court, Plaintiffs will actively seek consolidation at that time. Plaintiffs will also seek supplemental discovery unique to the personal injury case (which has many counts, including, for example, counts of fraud, constructive fraud, and fraudulent concealment).

Defendants argue that Plaintiffs cannot be prejudiced by any further delay in proceeding with discovery, because Plaintiffs "waited" until just shy of two years after Steven Schmitz's death to file the wrongful death claim. That is disingenuous and not a valid argument for seeking to stop discovery in the wrongful death case. The personal injury case has been pending in the appellate courts since September 2015, leaving Plaintiffs without the option to seek leave to amend to add a wrongful death claim in the trial court; in response, Plaintiffs ultimately initiated a separate wrongful death action as the time-table required. Plaintiffs' reasons for filing the wrongful death case in February 2017 did not contribute in any way to a delay in moving forward with this matter. Whether Plaintiffs filed the Wrongful Death case in 2015 or 2017, Defendants would have attempted to consolidate the matters and to delay the wrongful death case until the personal injury case was resolved in the appellate courts. Defendants' argument

proposes that the Court punish Plaintiffs for filing the wrongful death case within the statute of limitations. Plaintiffs, however, should not be penalized at all for making a decision in their best interest at the time it was made, and Defendants should not be advantaged for the same reasons.

In the interest of fairness and to avoid further delay, Plaintiffs' wrongful death case should proceed with discovery while the parties await the Supreme Court's ruling on Defendants' Petition for Jurisdiction. Given the nature of the case and the discovery required, and in light of the existing delays to date, efficiency and fairness require that Plaintiffs be permitted to proceed with discovery now. If and when the cases are consolidated, additional discovery can go forward in the personal injury case.

## IV. CONCLUSION

For all of the foregoing reasons, Plaintiffs respectfully request that the Court deny Defendants' Motion for Consolidation at this time, without prejudice to any party's right to seek consolidation in the future, after the Supreme Court of Ohio resolves the appellate matter at hand.

Date: March 23, 2017

Respectfully Submitted,

BARKAN MEIZLISH HANDELMAN
GOODIN DEROSE WENTZ, LLP

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**CERTIFICATE OF SERVICE**

I certify that on March 23, 2017, a true and correct copy of the foregoing was electronically filed with the Clerk of the Cuyahoga County Court of Common Pleas, using the electronic filing system, which will send notification of such filing to all counsel of record at the addresses that they have provided to the court.

*/s/ Robert E. DeRose*

*One of the Attorneys for Plaintiffs*

# EXHIBIT "A"

JS 44 (Rev. 12/12)

# CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. *(SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)*

## I. (a) PLAINTIFFS

STEVEN SCHMITZ and YVETTE SCHMITZ, on behalf of themselves and others similarly situated

(b) County of Residence of First Listed Plaintiff Cuyahoga (Ohio)
*(EXCEPT IN U.S. PLAINTIFF CASES)*

(c) Attorneys *(Firm Name, Address, and Telephone Number)*
Robert E. DeRose, Esq., Barkan Meizlish Handelman Goodin DeRose Wentz, LLP 250 E. Broad Street, 10th Floor, Columbus, Ohio 43215
Phone 614-221-4221

## DEFENDANTS

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, and UNIVERSITY OF NOTRE DAME

County of Residence of First Listed Defendant Marion (Indiana)
*(IN U.S. PLAINTIFF CASES ONLY)*

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys *(If Known)*

## II. BASIS OF JURISDICTION *(Place an "X" in One Box Only)*

- ☐ 1 U.S. Government Plaintiff
- ☐ 3 Federal Question *(U.S. Government Not a Party)*
- ☐ 2 U.S. Government Defendant
- ☒ 4 Diversity *(Indicate Citizenship of Parties in Item III)*

## III. CITIZENSHIP OF PRINCIPAL PARTIES *(Place an "X" in One Box for Plaintiff and One Box for Defendant)*
*(For Diversity Cases Only)*

| | PTF | DEF | | PTF | DEF |
|---|---|---|---|---|---|
| Citizen of This State | ☒ 1 | ☐ 1 | Incorporated *or* Principal Place of Business In This State | ☐ 4 | ☐ 4 |
| Citizen of Another State | ☐ 2 | ☐ 2 | Incorporated *and* Principal Place of Business In Another State | ☐ 5 | ☒ 5 |
| Citizen or Subject of a Foreign Country | ☐ 3 | ☐ 3 | Foreign Nation | ☐ 6 | ☐ 6 |

## IV. NATURE OF SUIT *(Place an "X" in One Box Only)*

**CONTRACT**
- ☐ 110 Insurance
- ☐ 120 Marine
- ☐ 130 Miller Act
- ☐ 140 Negotiable Instrument
- ☐ 150 Recovery of Overpayment & Enforcement of Judgment
- ☐ 151 Medicare Act
- ☐ 152 Recovery of Defaulted Student Loans (Excludes Veterans)
- ☐ 153 Recovery of Overpayment of Veteran's Benefits
- ☐ 160 Stockholders' Suits
- ☐ 190 Other Contract
- ☐ 195 Contract Product Liability
- ☐ 196 Franchise

**REAL PROPERTY**
- ☐ 210 Land Condemnation
- ☐ 220 Foreclosure
- ☐ 230 Rent Lease & Ejectment
- ☐ 240 Torts to Land
- ☐ 245 Tort Product Liability
- ☐ 290 All Other Real Property

**TORTS**

PERSONAL INJURY
- ☐ 310 Airplane
- ☐ 315 Airplane Product Liability
- ☐ 320 Assault, Libel & Slander
- ☐ 330 Federal Employers' Liability
- ☐ 340 Marine
- ☐ 345 Marine Product Liability
- ☐ 350 Motor Vehicle
- ☐ 355 Motor Vehicle Product Liability
- ☒ 360 Other Personal Injury
- ☐ 362 Personal Injury - Medical Malpractice

PERSONAL INJURY
- ☐ 365 Personal Injury - Product Liability
- ☐ 367 Health Care/ Pharmaceutical Personal Injury Product Liability
- ☐ 368 Asbestos Personal Injury Product Liability

PERSONAL PROPERTY
- ☐ 370 Other Fraud
- ☐ 371 Truth in Lending
- ☐ 380 Other Personal Property Damage
- ☐ 385 Property Damage Product Liability

**CIVIL RIGHTS**
- ☐ 440 Other Civil Rights
- ☐ 441 Voting
- ☐ 442 Employment
- ☐ 443 Housing/ Accommodations
- ☐ 445 Amer. w/Disabilities - Employment
- ☐ 446 Amer. w/Disabilities - Other
- ☐ 448 Education

**PRISONER PETITIONS**

Habeas Corpus:
- ☐ 463 Alien Detainee
- ☐ 510 Motions to Vacate Sentence
- ☐ 530 General
- ☐ 535 Death Penalty

Other:
- ☐ 540 Mandamus & Other
- ☐ 550 Civil Rights
- ☐ 555 Prison Condition
- ☐ 560 Civil Detainee - Conditions of Confinement

**FORFEITURE/PENALTY**
- ☐ 625 Drug Related Seizure of Property 21 USC 881
- ☐ 690 Other

**LABOR**
- ☐ 710 Fair Labor Standards Act
- ☐ 720 Labor/Management Relations
- ☐ 740 Railway Labor Act
- ☐ 751 Family and Medical Leave Act
- ☐ 790 Other Labor Litigation
- ☐ 791 Employee Retirement Income Security Act

**IMMIGRATION**
- ☐ 462 Naturalization Application
- ☐ 465 Other Immigration Actions

**BANKRUPTCY**
- ☐ 422 Appeal 28 USC 158
- ☐ 423 Withdrawal 28 USC 157

**PROPERTY RIGHTS**
- ☐ 820 Copyrights
- ☐ 830 Patent
- ☐ 840 Trademark

**SOCIAL SECURITY**
- ☐ 861 HIA (1395ff)
- ☐ 862 Black Lung (923)
- ☐ 863 DIWC/DIWW (405(g))
- ☐ 864 SSID Title XVI
- ☐ 865 RSI (405(g))

**FEDERAL TAX SUITS**
- ☐ 870 Taxes (U.S. Plaintiff or Defendant)
- ☐ 871 IRS—Third Party 26 USC 7609

**OTHER STATUTES**
- ☐ 375 False Claims Act
- ☐ 400 State Reapportionment
- ☐ 410 Antitrust
- ☐ 430 Banks and Banking
- ☐ 450 Commerce
- ☐ 460 Deportation
- ☐ 470 Racketeer Influenced and Corrupt Organizations
- ☐ 480 Consumer Credit
- ☐ 490 Cable/Sat TV
- ☐ 850 Securities/Commodities/ Exchange
- ☐ 890 Other Statutory Actions
- ☐ 891 Agricultural Acts
- ☐ 893 Environmental Matters
- ☐ 895 Freedom of Information Act
- ☐ 896 Arbitration
- ☐ 899 Administrative Procedure Act/Review or Appeal of Agency Decision
- ☐ 950 Constitutionality of State Statutes

## V. ORIGIN *(Place an "X" in One Box Only)*

☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from Another District *(specify)* ☐ 6 Multidistrict Litigation

## VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing *(Do not cite jurisdictional statutes unless diversity)*:
28 U.S.C. 1332

Brief description of cause:
Bodily and other injuries and other damages caused by the negligence (among other acts) of the Defendants.

## VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P.

DEMAND $ *Excess of $75,000*

CHECK YES only if demanded in complaint:
JURY DEMAND: ☒ Yes ☐ No

## VIII. RELATED CASE(S) IF ANY

*(See instructions):* JUDGE _____ DOCKET NUMBER _____

DATE 06/26/2014

SIGNATURE OF ATTORNEY OF RECORD /s/ Robert E. DeRose

**FOR OFFICE USE ONLY**

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____

# UNITED STATES DISTRICT COURT
# NORTHERN DISTRICT OF OHIO

**I.** Civil Categories: (Please check one category only).

1. ☑ General Civil
2. ☐ Administrative Review/Social Security
3. ☐ Habeas Corpus Death Penalty

*If under Title 28, §2255, name the SENTENCING JUDGE: .....

CASE NUMBER: .....

**II.** RELATED OR REFILED CASES. See LR 3.1 which provides in pertinent part: "If an action is filed or removed to this Court and assigned to a District Judge after which it is discontinued, dismissed or remanded to a State court, and subsequently refiled, it shall be assigned to the same Judge who received the initial case assignment without regardfor the place of holding court in which the case was refiled. Counsel or a party without counsel shall be responsible for bringing such cases to the attention of the Court by responding to the questions included on the Civil Cover Sheet."

This action is ☐ **RELATED** to another **PENDING** civil case. This action is ☐ **REFILED** pursuant to **LR 3.1**.

**If applicable, please indicate on page 1 in section VIII, the name of the Judge and case number.**

**III.** In accordance with Local Civil Rule **3.8**, actions involving counties in the Eastern Division shall be filed at any of the divisional offices therein. Actions involving counties in the Western Division shall be filed at the Toledo office. For the purpose of determining the proper division, and for statistical reasons, the following information is requested.

ANSWER ONE PARAGRAPH ONLY. ANSWER PARAGRAPHS 1 THRU 3 IN ORDER. UPON FINDING WHICH PARAGRAPH APPLIES TO YOUR CASE, ANSWER IT AND STOP.

(1) **Resident defendant. If** the defendant resides in a county **within** this district, please set forth the name of such county

**COUNTY:**

Corporation **For the purpose of answering the above, a corporation is deemed to be a resident of that county in which it has its principal place of business in that district.**

(2) **Non-Resident defendant.** If no defendant is a resident of a county in this district, please set forth the county wherein the cause of action arose or the event complained of occurred.

**COUNTY:**

(3) **Other Cases.** If no defendant is a resident of this district, or if the defendant is a corporation not having a principle place of business within the district, and the cause of action arose or the event complained of occurred outside this district, please set forth the county of the plaintiff's residence.

**COUNTY:**

**IV.** The Counties in the Northern District of Ohio are divided into divisions as shown below. After the county is determined in Section **III**, please check the appropriate division.

**EASTERN DIVISION**

| | | |
|---|---|---|
| ☐ | AKRON | (Counties: Carroll, Holmes, Portage, Stark, Summit, Tuscarawas and Wayne) |
| ☑ | CLEVELAND | (Counties: Ashland, Ashtabula, Crawford, Cuyahoga, Geauga, Lake, Lorain, Medina and Richland) |
| ☐ | YOUNGSTOWN | (Counties: Columbiana, Mahoning and Trumbull) |

**WESTERN DIVISION**

| | | |
|---|---|---|
| ☐ | TOLEDO | (Counties: Allen, Auglaize, Defiance, Erie, Fulton, Hancock, Hardin, Henry, Huron, Lucas, Marion, Mercer, Ottawa, Paulding, Putnam, Sandusky, Seneca VanWert, Williams, Wood and Wyandot) |

# EXHIBIT "B"

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 103525

## STEVEN SCHMITZ, ET AL.

PLAINTIFFS-APPELLANTS

vs.

## NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, ET AL.

DEFENDANTS-APPELLEES

**JUDGMENT:**
AFFIRMED IN PART, REVERSED IN PART,
AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-14-834486

**BEFORE:** Boyle, J., Jones, A.J., and Celebrezze, J.

**RELEASED AND JOURNALIZED:** December 8, 2016

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MARY J. BOYLE, J.:

{¶1} Plaintiffs-appellants, the estate of Steven T. Schmitz and Yvette Schmitz, individually and as fiduciary of the estate of Steven T. Schmitz, deceased (collectively "plaintiffs"), appeal the trial court's decision granting the motions to dismiss filed by defendants-appellees, the University of Notre Dame du Lac ("Notre Dame") and the National Collegiate Athletic Association ("the NCAA") (collectively "defendants"). Plaintiffs raise the following single assignment of error:

> The trial court erred by granting the motions to dismiss, because the complaint's allegations are sufficient to state each claim, and the complaint does not conclusively show on its face that plaintiffs-appellants' claims are barred by the statute of limitations.

{¶2} Finding some merit to the appeal, we affirm in part, reverse in part, and remand for further proceedings.

## I. Procedural History and Factual Background

{¶3} From 1974 to 1978, Steven Schmitz, a former running back and receiver, played football for Notre Dame, a member institution of the NCAA.[1] In December 2012, Schmitz was diagnosed by the Cleveland Clinic Neurology Department with chronic traumatic encephalopathy ("CTE") — a latent brain disease caused by repetitive head impacts. At that time, Schmitz was 57 years

[1] All of the facts set forth in this opinion are taken from plaintiffs' first amended complaint.

old and unemployable, suffering from severe memory loss, cognitive decline, early onset Alzheimer's disease, traumatic encephalopathy, and dementia.

{¶4} In October 2014, Schmitz and his wife, Yvette Schmitz, filed the underlying lawsuit against Notre Dame and the NCAA. According to plaintiffs' first amended complaint ("complaint"), which is the subject of this appeal,

> Notre Dame, its football coaches, athletic directors, and trainers, and the NCAA failed to notify, educate, and protect the plaintiff Steve Schmitz (and others) regarding the debilitating long term dangers of concussions, concussion-related impacts, and sub-concussive impacts that result every day from amateur athletic competition in the form of football at the collegiate level.

{¶5} The complaint alleges that Notre Dame and the NCAA knew (or should have known) "college football players are at greater risk for chronic brain injury, illness, and disability both during their football careers and later in life." And that, despite this knowledge, Notre Dame and the NCAA "orchestrated an approach to football practices and games" that (1) "ignored the medical risks to Steve Schmitz"; (2) "aggravated and enhanced the medical risks to Steve Schmitz"; (3) "failed to educate Steve Schmitz of the link between concussive and sub-concussive impacts in amateur football and chronic neurological damage, illnesses, and decline"; and (4) "failed to implement or enforce any system that would reasonably have mitigated, prevented, or addressed concussive and sub-concussive impacts suffered by Steve Schmitz." The complaint sets forth counts for negligence, fraud by concealment, constructive fraud, breach of express and implied contract, and loss of consortium.

{¶6} In March 2015, defendants moved to dismiss plaintiffs' amended complaint. Specifically, Notre Dame moved to dismiss the amended complaint on the grounds that plaintiffs' claims are time-barred. The NCAA moved to dismiss the claims on both statute of limitations grounds and failure to state a claim under Ohio or Indiana law.

{¶7} Schmitz died on February 13, 2015. Thereafter, the estate of Steven Schmitz was substituted as a plaintiff as well as Yvette Schmitz as fiduciary of her husband's estate and in her personal capacity.

{¶8} On September 1, 2015, the trial court granted both Notre Dame's and the NCAA's motion to dismiss without opinion and dismissed the amended complaint with prejudice. This appeal follows.

**II. Civ.R. 12(B)(6) — Standard of Review**

{¶9} We review an order dismissing a complaint for failure to state a claim for relief under Civ.R. 12(B)(6) de novo. *Perrysburg Twp. v. Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4362, 814 N.E.2d 44, ¶ 5. When reviewing a Civ.R. 12(B)(6) motion to dismiss, we must accept the material allegations of the complaint as true and make all reasonable inferences in favor of the plaintiff. *Johnson v. Microsoft Corp.*, 106 Ohio St.3d 278, 2005-Ohio-4985, 834 N.E.2d 791, ¶ 6. However, while the factual allegations of the complaint must be taken as true, "[u]nsupported conclusions of a complaint are not considered admitted * * * and are not sufficient to withstand a motion to dismiss." *State ex rel.*

*Hickman v. Capots*, 45 Ohio St.3d 324, 544 N.E.2d 639 (1989). For a defendant to prevail on the motion, it must appear from the face of the complaint that the plaintiff can prove no set of facts that would justify a court in granting relief. *O'Brien v. Univ. Community Tenants Union, Inc.*, 42 Ohio St.2d 242, 245, 327 N.E.2d 753 (1975). "Under these rules, a plaintiff is not required to prove his or her case at the pleading stage. * * * Consequently, as long as there is a set of facts, consistent with the plaintiff's complaint, which would allow the plaintiff to recover, the court may not grant a defendant's motion to dismiss." *York v. Ohio State Hwy. Patrol*, 60 Ohio St.3d 143, 144-145, 573 N.E.2d 1063 (1991).

**{¶10}** Additionally, under Ohio's liberal pleading rules, all that is required of a plaintiff bringing suit is "(1) a short and plain statement of the claim showing that the party is entitled to relief, and (2) a demand for judgment for the relief to which the party claims to be entitled." Civ.R. 8(A). Unlike other claims, however, fraud claims must be plead with particularity as required under Civ.R. 9(B).

**III. Statute of Limitations**

**{¶11}** While the parties dispute the governing state substantive law that applies to plaintiffs' claims — Indiana or Ohio — there is no dispute that Ohio, the forum state, provides the applicable statute of limitations. *See Howard v. Allen*, 30 Ohio St.2d 130, 133, 283 N.E.2d 167 (1972) ("[L]imitation provisions are remedial in nature, and are therefore controlled by the law of the forum.").

Both Notre Dame and the NCAA moved to dismiss the complaint on the basis that Ohio's statute of limitations had run on all of plaintiffs' claims. We first examine this issue applying Ohio law.

{¶12} Plaintiffs argue that the trial court erred in dismissing their complaint as being time-barred. Plaintiffs maintain that the complaint pleads a latent undiscoverable injury that became manifest decades after Schmitz played football and that the complaint does not on its face show beyond doubt that plaintiffs cannot recover based on a statute of limitations defense. According to plaintiffs, the trial court erred in failing to apply the discovery rule, which would have tolled their claims until December 2012 — the date when they became aware of the injury and the cause of the injury. Because they filed their original complaint approximately 18 months after learning of the diagnosis, they argue that their claims were timely and well within (1) the two-year limitation period for their negligence personal injury claim under R.C. 2305.10, (2) the four-year limitation period for their fraud claim as contained in R.C. 2305.09, and (3) the 15- and six-year period for their express written and implied contract claims as contained in R.C. 2305.06 and 2305.07.

**A. Purpose of Statute of Limitations**

{¶13} "Statutes of limitations serve a gate-keeping function for courts by '(1) ensuring fairness to the defendant, (2) encouraging prompt prosecution of causes of action, (3) suppressing stale and fraudulent claims, and (4) avoiding

the inconveniences engendered by delay — specifically, the difficulties of proof present in older cases.'" (Citations omitted.) *Flagstar Bank, F.S.B. v. Airline Union's Mtge. Co.*, 128 Ohio St.3d 529, 2011-Ohio-1961, 947 N.E.2d 672, ¶ 7. Nevertheless, "statutes of limitations are remedial in nature and are to be given a liberal construction to permit cases to be decided upon their merits, after a court indulges every reasonable presumption and resolves all doubts in favor of giving, rather than denying, the plaintiff an opportunity to litigate." *Id.* at ¶ 7; *Harris v. Reedus*, 2015-Ohio-4962, 50 N.E.3d 1036, ¶ 11 (10th Dist.).

**B. Discovery Rule**

**{¶14}** Generally, a cause of action accrues and the statute of limitations begins to run at the time the wrongful act was committed. *Collins v. Sotka*, 81 Ohio St.3d 506, 507, 692 N.E.2d 581 (1998). The discovery rule, however, is an exception to this general rule and provides that "a cause of action does not arise until the plaintiff knows, or by the exercise of reasonable diligence should know, that he or she has been injured by the conduct of the defendant." *Flagstar Bank* at ¶ 14, citing *Collins* at *id.* "The rule entails a two-pronged test — i.e., actual knowledge not just that one has been injured but also that the injury was caused by the conduct of the defendant." *Id.*, citing *O'Stricker v. Jim Walter Corp.*, 4 Ohio St.3d 84, 447 N.E.2d 727 (1983). A statute of limitations does not begin to run until both prongs have been satisfied. *Id.*

{¶15} The first issue that we must decide is whether the discovery rule applies to plaintiffs' claims.

*1. Contract Claims*

{¶16} With respect to plaintiffs' contract claims, we find that it does not. As plaintiffs even acknowledge, no Ohio court has ever applied the discovery rule to a claim for a breach of contract. *See Cristino v. Bur. of Workers' Comp.*, 2012-Ohio-4420, 977 N.E.2d 742, ¶ 41 (10th Dist.) (recognizing this fact and refusing to be the first court to do so). Indeed, this court has expressly rejected the application of such rule to a contract claim. *See Pomeroy v. Schwartz*, 8th Dist. Cuyahoga No. 99638, 2013-Ohio-4920, ¶ 39.

{¶17} Here, based on the allegations of the complaint, any breach arising out of an express or implied contract must have occurred during the time that Schmitz attended Notre Dame — in or before 1978. Without the benefit of the discovery rule, plaintiffs' breach of contract claims are barred by the statute of limitations contained in R.C. 2305.06 and 2305.07, which require a plaintiff to bring a contract claim within 15 years (express written contract) or six years (implied contract) of the alleged breach of the contract.[2] Because those claims are time-barred, we find no error in the trial court's dismissal of those claims.

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[2] Although R.C. 2305.06 was amended in 2012 to change the statute of limitations for written contract claims to eight years, the 15-year statute applies to claims that accrued prior to September 28, 2012.

*2. Personal Injury/Negligence Claim*

**{¶18}** Unlike contract claims, Ohio courts have routinely applied the discovery rule to negligence personal injury claims. *See Flagstar Bank,* 128 Ohio St.3d 529, 2011-Ohio-1961, 947 N.E.2d 672, at ¶ 15. While defendants do not dispute this point, they nonetheless argue that the discovery rule does not apply in this case. We disagree.

*a. Date of Discovery of Injury and Type of Injury*

**{¶19}** According to defendants, the discovery rule has been applied only in limited circumstances involving latent injuries and not when a plaintiff's injury was immediately apparent, such as the instant case. In their motions to dismiss, defendants maintained that the complaint does not allege facts supporting a latent injury case. Instead, the defendants argued that the complaint plainly alleges that Schmitz experienced concussion symptoms and knew he suffered some type of injury while playing football at Notre Dame in the 1970s. Consequently, the defendants contended that the plaintiffs' claims are time-barred because the claims accrued nearly 40 years ago, at the time that Schmitz alleged he was injured.

**{¶20}** Conversely, plaintiffs maintained that defendants' argument misconstrues the allegations of the complaint. According to plaintiffs, they pleaded that Schmitz suffered from latent brain disease and discovered its cause and diagnosis later in life when the symptoms became manifest and the

condition was diagnosed by the Cleveland Clinic Foundation. Plaintiffs argued that these allegations support the application of the discovery rule.

**{¶21}** Although this issue is one of first impression in Ohio, other courts have recently addressed substantially similar arguments in analogous cases involving latent brain injuries suffered by former professional hockey players and former professional stunt wrestlers. *See In re NHL Players' Concussion Injury Litigation*, D.Minn. No. 14-2551, 2015 U.S. Dist. LEXIS 38755 (Mar. 25, 2015); *McCullough v. World Wrestling Entertainment, Inc.*, D.Conn. Nos. 3:15-CV-001074, 3:15-CV-00425, and 3:15-CV-01156, 2016 U.S. Dist. LEXIS 39791 (Mar. 21, 2016). These courts rejected defendants' claims that the statute of limitations accrued at the time of the concussive and subconcussive impacts, recognizing that plaintiffs' alleged injuries in the form of an increased risk of developing neurodegenerative diseases, such as CTE, are distinctly different than the head injuries they sustained while playing the sport. As explained by the Connecticut district court in the wrestling case:

> The mere fact that the Pre-2012 Plaintiffs allege that they sustained concussions and head trauma during their tenure with the WWE; and that they allege awareness of those concussions and possible concussion-like symptoms at the time, is not necessarily dispositive here at the motion to dismiss stage. A single [mild traumatic brain injury ("MTBI")] such as a concussion, and the symptoms that a discrete MTBI can manifest, are not the same "condition" as a disease such as CTE or another degenerative neurological disorder that may — or may not — be caused by repeated MTBIs.

*Id.* at *41-42.

{¶22} For this reason, the Connecticut federal district court found that the allegations of the complaint did not support the conclusion that the plaintiffs had been on notice of their alleged injuries, i.e., increased risk for latent, permanent neurological conditions, simply because they had suffered a concussion. Specifically, the court explained as follows:

> Here, however, it cannot be determined from the face of the Complaints and as a matter of law that the Pre-2012 Plaintiffs were on notice of an increased risk for a latent, permanent neurological condition merely because they knew they had suffered a concussion and/or sustained other minor brain trauma during the time they wrestled for WWE. The Pre-2012 Plaintiffs' knowledge, or lack thereof, of a connection [between] repeated concussions or sub-concussive blows to the head and latent, permanent neurological conditions presents a material issue of fact that must be decided at a later date. Without knowledge of such a connection, Plaintiffs may have discovered "some injury," but not "actionable harm" because of their inability to tie head trauma that they knew they were sustaining to another party's breach of a duty to disclose increased risks for latent, permanent neurological conditions.

*Id.* at *44-45.

{¶23} Similarly, the Minnesota federal district court in the hockey case explained as follows:

> Assuming for purposes of this Motion that the NHL has correctly identified which states' statutes of limitations apply to Plaintiffs' claims, it is not clear from the face of the Master Complaint that those limitations periods have run. For example, Plaintiffs have alleged injuries in the form of "an increased risk of developing serious latent neurodegenerative disorders and diseases including but not limited to CTE, dementia, Alzheimer's disease or similar cognitive-impairing conditions," (Master Compl. ¶¶ 402, 425; see id. ¶¶ 38, 50, 56-57, 65, 72, 83, 425, 436, 444, 453); and "latent or manifest neuro-degenerative disorders and diseases," (id. ¶ 18). They have further alleged that, for example, "CTE is caused by

> repeated sublethal brain trauma of the sort Plaintiffs repeatedly suffered," (id. ¶ 210), including sub-concussive impacts that are not diagnosed as concussions and which are sustained by the thousands by NHL players each year, (id. ¶¶ 216-17, 220); and that "brain injury and brain disease in NHL retirees is a latent disease that can appear years or decades after the player experiences head trauma in his NHL career," (id. ¶ 407). Thus, when such injuries "occurred" or "resulted" are matters that cannot be determined from the face of the Master Complaint and are proper subjects of discovery.

*In re NHL Players' Concussion* at *17-18.

**{¶24}** Although these cases are not binding on this court, we find their reasoning instructive and applicable to the instant case.

**{¶25}** Here, plaintiffs allege a latent injury that Schmitz was not aware of until his diagnosis in 2012. The complaint further alleges that, prior to the diagnosis, Schmitz never understood or appreciated the nature of the risk of the subconcussive and concussive impacts he sustained; that he never understood that those impacts "significantly increased his risk of developing neurodegenerative disorders and diseases," and resulted in "latent effects" and "neurocognitive and neurobehavioral changes over time." The thrust of the complaint is not an injury for concussive and subconcussive impacts; instead, the complaint alleges an injury in the form of CTE and other neurological diseases that did not manifest until decades after Schmitz stopped playing football at Notre Dame.

**{¶26}** We find the Ohio Supreme Court's decision in *Liddell v. SCA Servs.*, 70 Ohio St.3d 6, 635 N.E.2d 1233 (1994), analogous and supports the

application of the discovery rule in this case. In *Liddell*, the Ohio Supreme Court allowed a plaintiff to proceed when he sought recovery for the latent effects of toxic gas exposure, even though the toxic gas had caused him to suffer adverse health effects immediately following his exposure.

{¶27} The plaintiff in *Liddell* was a police officer who was exposed to a hazardous substance while responding to a report of a large fire on board a truck that was transporting the substance. On the day of the incident, the plaintiff was treated at a hospital for smoke inhalation and shortly thereafter filed a workers' compensation claim seeking coverage of his medical bills associated with the incident, and also applied for a permanent partial disability award as a result of inhalation of the fumes. Within nine months of his exposure to the toxic gas, the plaintiff began to experience frequent sinus infections. Six years after the exposure, the plaintiff underwent surgery to remove a benign papilloma from his left nasal cavity. Then, one year after the surgery, a biopsy revealed a cancerous growth in the plaintiff's left nasal cavity. At that time, the plaintiff's physician advised him that there might be a connection between his cancer and his inhalation of the toxic fumes seven years earlier. Plaintiff subsequently filed suit against the truck's owner within two years of being advised of the connection between his cancer and his inhalation of the toxic fumes.

{¶28} The lower courts found that summary judgment in the defendant's favor was appropriate because the plaintiff had suffered adverse health consequences immediately upon being exposed to the toxic gas, and the plaintiff was aware of the exposure at the time it occurred. Consequently, the lower courts held that the plaintiff's cause of action had accrued on the date of the truck fire. The Ohio Supreme Court reversed, finding that "the cancer could not be, and was not, discovered until after the applicable statute of limitations governing causes of action for bodily injury had expired." *Id.* at 8. The *Liddell* court determined that it needed to "look no further than [*O'Stricker*, 4 Ohio St.3d 84, 447 N.E.2d 727] to resolve the issue facing us today. *O'Stricker* cogently outlines the reasons for adopting a discovery rule in latent disease cases." *Liddell* at 12. The court further stated:

> Consistent with our reasoning in *O'Stricker*, this case does not represent the circumstance of a plaintiff sitting on his rights. Liddell could not, and did not, discover his injury, the cancer, before the two-year statute of limitations governing bodily injuries had expired. Moreover, had Liddell attempted to bring a cause of action for negligence in 1981, any specification of damages for cancer certainly would have been strongly opposed by SCA on the grounds that they were too speculative. Hence, under SCA's theory Liddell would be confronted with a dilemma. He could either meet the statute of limitations and file a claim for compensation more than four years *before* he discovered the disease, or, as he did here, file a claim at the time of discovery, which occurred more than four years *after* the statute of limitations had expired.

(Emphasis sic.) *Id.* at 13.

{¶29} As noted by the Tenth District in analyzing *Liddell*,

> The unanimous court in *Liddell* was apparently wholly untroubled by the fact that the plaintiff had immediately experienced adverse health effects from his exposure to the toxic gas, filed a workers' compensation claim arising out of his inhalation of the fumes, and later underwent removal of a benign nasal papilloma in the same region in which his cancer was later discovered. Instead, the court focused on the condition of which Liddell complained; that is, his cancer.

*Girardi v. Boyles*, 10th Dist. Franklin No. 05AP-557, 2006-Ohio-947, ¶ 44.

**{¶30}** Here, we must focus on the condition of which Schmitz complained — CTE. Like the plaintiff in *Liddell*, this is not a case of Schmitz sitting on his rights. According to the complaint, Schmitz could not, and did not, discover his CTE before the two-year statute of limitations governing bodily injuries had expired. Further, had Schmitz attempted to bring a cause of action for negligence in 1980, two years after he quit playing football at Notre Dame, any specification of damages for CTE certainly would have been strongly opposed by the defendants on the grounds that they were too speculative.

**{¶31}** For this same reason, we do not find that the allegations alleged in the complaint fall within the line of cases holding that a plaintiff's claim accrues when he or she is aware of the possibility of the injury, even though he or she may not be aware of the full extent of the injury. These cases do not involve latent injuries coupled with an issue of the plaintiff not knowing that the defendants' actions allegedly caused the complained injuries giving rise to the cause of action.

{¶32} For example, in *Pingue v. Pingue*, 5th Dist. Delaware No. 03-CA-E-12070, 2004-Ohio-4173, which both defendants argue controls, the plaintiff clearly knew the identity of the perpetrator giving rise to his claims years before filing his lawsuit. Specifically, *Pingue* involves an action for assault, infliction of emotional distress, and unintentional infliction of emotional distress filed by the plaintiff-son against his father. According to the complaint, the son alleged that his father had physically abused him for 28 years, with the abuse ending in 1990. The son, however, did not file any action until March 6, 2003 — approximately one year after his neurologist informed him he had suffered an irreversible brain injury and suffered from post-traumatic stress disorder. The son also learned that he was at a greater risk of contracting Parkinson's disease and Alzheimer's disease as a result of his brain injury.

{¶33} The trial court granted the father's motion for judgment on the pleadings, finding that, although the son may not have understood the true extent of his injuries until March 2002, he knew he had been injured and knew the identity of the person who injured him at least since 1990. The appellate court agreed with this reasoning, noting that "[w]hat appellant has recently discovered is not that he was injured, but rather the extent of his injuries." *Id.* at ¶ 19. The court reiterated the principle that "if a discovery rule is applicable, the cause accrues when the plaintiff discovers her [or his] legal injury, even if she [or he] does not know the total extent of the injury." *Id.* at ¶ 20. Thus, in

affirming the trial court, the court held that "the statute of limitations begins to run when the plaintiff knows both he has been injured, and the identity of the alleged perpetrator." *Id.* at ¶ 23.

{¶34} The link between the injurious conduct and the known perpetrator that was clearly present in *Pingue* does not exist in this case. Whereas the plaintiff in *Pingue* was clearly aware of the wrongful conduct giving rise to his claims for assault, intentional infliction of emotional distress, and unintentional emotional distress during the 28 years that his father was abusing him, the complaint in this case does not reveal that Schmitz was aware of any wrongful conduct until decades after he finished playing football. Schmitz did not know at the time that he was playing football that the defendants were allegedly negligent or allegedly concealing information from him. Nor did he know that he had suffered a latent injury caused by playing football. According to the complaint, Schmitz did not make this connection until his diagnosis — well after the time period to bring an action under the statute of limitations. Unlike the son in *Pingue*, this is not a case where the plaintiff sat on his rights for years, despite having the necessary facts to bring a legal claim earlier. The complaint does not allege facts that would allow this court to conclude as a matter of law that Schmitz discovered his legal injury as early as 1978, when he finished playing football at Notre Dame.

*b. Exercise of Reasonable Diligence*

**{¶35}** The next question for us to answer is whether Schmitz exercised reasonable diligence to discover his injuries.

**{¶36}** In cases where the discovery rule applies, the statute of limitations typically beings to run either (1) "upon the date on which the plaintiff is informed by competent medical authority that he has been injured," or (2) "upon the date on which, by the exercise of reasonable diligence, he should have become aware that he had been injured, whichever date occurs first." *O'Stricker*, 4 Ohio St.3d at 90, 447 N.E.2d 727.

**{¶37}** According to the defendants, even if the discovery rule applies, plaintiffs' claims are still time-barred. While plaintiffs maintain that the date of diagnosis controls, namely, December 2012, defendants argue that the face of the complaint establishes that Schmitz should have known of his injuries years earlier. According to Notre Dame, "the last possible trigger date for plaintiffs' claims is April 2010, when plaintiffs allege that NCAA made changes to its concussion treatment protocols."

**{¶38}** At this stage in the proceedings, however, we cannot say as a matter of law that Schmitz should have discovered earlier either (1) his injury or (2) that his injury was caused by the conduct of the defendants. While the complaint details published studies originating in the late 1920s and continuing well into the present, which expressly linked concussive and subconcussive

impacts experienced in contact sports with serious neurological impairments and diseases, such as CTE, the complaint alleges that Schmitz never knew any of this information. Moreover, the complaint does not allege any facts that would have alerted Schmitz to his condition prior to his diagnosis in December 2012 or that his injury was the result of defendants' alleged tortious conduct. *Compare Sullivan v. Westfield Ins. Co.*, 5th Dist. Stark No. 2006CA00296, 2007-Ohio-4248, ¶ 33 (affirming trial court's decision not to apply discovery rule because defendant's motion for summary judgment established that plaintiff had knowledge of all the relevant facts at least 15 years earlier to have discovered the alleged fraud).

**{¶39}** Thus, without more facts or evidence in the record, we cannot say as a matter of law that plaintiffs' claims are time-barred. *See Barr v. Lauer*, 8th Dist. Cuyahoga No. 92497, 2009-Ohio-5563, ¶ 30 (finding the grant of summary judgment improper because the record did not conclusively establish that plaintiff failed to exercise reasonable diligence to discover the cause of action — "[w]hether or not the discovery rule is applicable to this case is an issue that can only be addressed after further facts are put in evidence").

*3. Fraud Claims*

**{¶40}** Under R.C. 2305.09, an action for fraud "shall be brought within four years after the cause thereof accrued." The statute further provides that the cause of action does not accrue "until the fraud is discovered." Defendants

maintain, however, that plaintiffs' fraud claims are subject to the two-year statute of limitations contained in R.C. 2305.10 because the action is for bodily harm. We disagree. While Ohio courts have recognized that a plaintiff cannot couch a claim for bodily injury as a fraud claim simply as a means to extend the statute of limitations, this is not the case here. Plaintiffs' fraud claims are separate and distinct from the other claims — not merely a vehicle to extend the statute of limitations on plaintiffs' negligence/personal injury action. *See Gaines v. Preterm–Cleveland, Inc.*, 33 Ohio St.3d 54, 56, 514 N.E.2d 709 (1987) ("As a cause of action separate and distinct from medical malpractice, a claim for fraud is subject not to the medical malpractice statute of limitations * * * but rather a four-year limitations period for fraud.") But regardless of what statute of limitations apply in this case, the claims are not time-barred because the discovery rule applies.

{¶41} Accordingly, because the complaint does not conclusively show on its face that the negligence and fraud claims are time-barred, we find that the trial court erred in dismissing those claims on statute of limitations grounds.

**IV. Substantive Claims**

{¶42} Having found that plaintiffs' tort claims are not time-barred, we must address the other grounds asserted by the NCAA in support of its motion to dismiss, namely, whether plaintiffs sufficiently pleaded claims for negligence and fraud to overcome a Civ.R. 12(B)(6) motion.

**A. Governing Law**

**{¶43}** The parties dispute what state's substantive law applies. Although the NCAA makes a compelling argument that Indiana substantive law should apply based on an application of the Second Restatement of the Law of Conflicts, the NCAA nonetheless concedes that "the elements of plaintiffs' claims are substantially similar under Indiana and Ohio law." The NCAA does not point to any conflict between the two states' laws on negligence and fraud.[3]

**{¶44}** "'Under Ohio law, if two jurisdictions apply the same law, or would reach the same result applying their respective laws, a choice of law determination is unnecessary because there is no conflict, and the laws of the forum state apply.'" *Dana Ltd. v. Aon Consulting, Inc.*, 984 F.Supp.2d 755 (N.D.Ohio 2013), quoting *Mulch Mfg. Inc. v. Advanced Polymer Solutions, L.L.C.*, 947 F.Supp.2d 841 (S.D.Ohio 2013); *see also Glidden Co. v. Lumbermens Mut. Cas. Co.*, 112 Ohio St.3d 470, 474-475, 2006-Ohio-6553, 861 N.E.2d 109, ¶ 25 (recognizing that "an actual conflict between Ohio law and the law of

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[3] In its motion to dismiss, the NCAA argued that Indiana law governs because the alleged injuries occurred in Indiana where Schmitz competed as a member of the Notre Dame football team and Indiana has the most substantial relationship to the claims asserted here. Aside from broadly asserting that Ohio has the most significant relationship to plaintiffs' claims and the facts of the case, plaintiffs did not dispute that the alleged injuries occurred in Indiana as advanced by the NCAA. Our reading of the complaint supports the NCAA's position that Indiana has the most significant relationship to the lawsuit. But even if we were to apply Indiana law to the claims at issue, it would not change the outcome. Under either state law, plaintiffs' negligence and fraud by concealment claims should have withstood a motion to dismiss.

another jurisdiction must exist for a choice-of-law analysis to be undertaken"); *Akro-Plastics v. Drake Industries*, 115 Ohio App.3d 221, 685 N.E.2d 246 (11th Dist.1996); *Carder Buick-Olds Co. v. Reynolds & Reynolds*, 148 Ohio App.3d 635, 2002-Ohio-2912, 775 N.E.2d 531 (2d Dist.) (finding that defendant failed to carry its burden of proving a conflict with forum state and therefore applying Ohio law to fraud claims).

{¶45} Accordingly, we apply Ohio law to determine whether plaintiffs have sufficiently pleaded negligence and fraud claims to survive a motion to dismiss under Civ.R. 12(B)(6).

**B. Negligence**

{¶46} The elements of a negligence claim are "(1) the existence of a legal duty, (2) the defendant's breach of that duty, and (3) injury that is the proximate cause of the defendant's breach." *Wallace v. Ohio DOC*, 96 Ohio St.3d 266, 2002-Ohio-4210, 773 N.E.2d 1018, ¶ 22, citing *Mussivand v. David*, 45 Ohio St.3d 314, 318, 544 N.E.2d 265 (1989).[4]

{¶47} In its motion to dismiss, NCAA argued that plaintiffs' negligence claim should be dismissed because they did not allege a duty recognized by law. NCAA maintains that the complaint "offers no set of facts" to show that it "took affirmative and deliberate steps to assume a duty recognized by law specifically to prevent the injuries alleged by Schmitz." We disagree.

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[4] The elements of a negligence claim under Indiana law are identical. *See Pfenning v. Lineman*, 947 N.E.2d 392, 398 (Ind.2011).

*1. Duty was Sufficiently Pleaded to Withstand a Motion to Dismiss*

{¶48} "Duty, as used in Ohio tort law, refers to the relationship between the plaintiff and the defendant from which arises an obligation on the part of the defendant to exercise due care toward the plaintiff." *Commerce & Industry Ins. Co. v. Toledo*, 45 Ohio St.3d 96, 98, 543 N.E.2d 1188 (1989).[5] Indeed, the Ohio Supreme Court has often stated that "the existence of a duty depends upon the foreseeability of harm: if a reasonably prudent person would have anticipated that an injury was likely to result from a particular act, the court could find that the duty element of negligence is satisfied." *Wallace* at ¶ 23, citing *Texler v. D.O. Summers Cleaners & Shirt Laundry Co.*, 81 Ohio St.3d 677, 680, 693 N.E.2d 271 (1998); *Commerce & Industry* at 98; *Menifee v. Ohio Welding Prods., Inc.*, 15 Ohio St.3d 75, 77, 472 N.E.2d 707 (1984). The existence of duty may be established by common law, statute, or by the particular facts and circumstances of a case. *Chambers v. St. Mary's School*, 82 Ohio St.3d 563, 565, 697 N.E.2d 198 (1998). In any case, the existence of a duty is a question of law for the court. *Mussivand* at 318.

{¶49} Additionally, Ohio courts have recognized a duty to use reasonable care arising from a party's voluntary undertaking. *See, e.g., McMullen v. Ohio State Univ. Hosps.*, 88 Ohio St.3d 332, 338, 725 N.E.2d 1117 (2000); *Douglass*

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[5] Similar to Ohio law, the Indiana Supreme Court has set forth a three-part test balancing the following factors to decide whether a duty exists: "(1) the relationship between the parties, (2) the reasonable foreseeability of harm to the person injured, and (3) public policy concerns." *Webb v. Jarvis*, 575 N.E.2d 992, 995 (Ind.1991).

*v. Salem Community Hosp.*, 153 Ohio App.3d 350, 2003-Ohio-4006, 794 N.E.2d 107 (7th Dist.); *Elliott v. Fosdick & Hilmer*, 9 Ohio App.3d 309, 460 N.E.2d 257 (12th Dist.1983).[6]

**{¶50}** The NCAA moved to dismiss the negligence claim on the grounds that, under Indiana law, "colleges, fraternities and other on-campus entities — from which the NCAA is even further removed — typically do not owe 'a general duty of care' to students." The NCAA does not offer a single case, however, where an Indiana court has decided this issue at the pleadings stage. Nor do we find a single Ohio case that stands for the broad proposition that the NCAA advances. Further, while we recognize that the issue of duty is a legal determination, we cannot agree that, construing all allegations of the complaint as true, there is no set of facts consistent with the complaint that would allow the plaintiffs to recover on a negligence theory under either Ohio or Indiana law at this stage in the proceedings.

*2. Lanni v. NCAA is Distinguishable*

**{¶51}** Relying on the recent decision of the Indiana Court of Appeals in *Lanni v. NCAA*, 42 N.E.3d 542 (Ind.App.2015), the NCAA maintains that the facts of the complaint are insufficient to show that it took affirmative and

[6] Similarly, Indiana law recognizes the same duty: "[a] duty of care may * * * arise where one party assumes such a duty, either gratuitously or voluntarily. The assumption of such a duty creates a special relationship between the parties and a corresponding duty to act in the manner of a reasonably prudent person." *Yost v. Wabash College*, 3 N.E.3d 509, 517 (Ind.2014).

deliberate steps to assume a duty recognized by law specifically to prevent the injuries alleged by Schmitz. In *Lanni*, the plaintiff, a student-athlete who attended a NCAA sponsored fencing competition and suffered a serious eye injury, filed a negligence action against the NCAA (among other defendants). The trial court ultimately granted summary judgment in favor of the NCAA, finding that the NCAA did not owe Lanni a duty of care under either theory advanced: a general duty of care or the voluntary assumption of a duty.

{¶52} Even if we agreed that Indiana law controlled, the decision in *Lanni* would not alter our decision. Although we believe that there are a number of factual distinctions between the two cases, including the foreseeability of the harm and the public policy at issue, we find the most significant distinction is a procedural one: the *Lanni* court was reviewing a trial court's grant of summary judgment — not a motion to dismiss.[7] Based on the evidence presented, the court found that the "NCAA's conduct does not demonstrate that it undertook or assumed a duty to actually oversee or directly supervise the actions of the member institutions and the NCAA's student-

[7] In *Lanni*, the plaintiff was injured in an area designated for student-athletes to observe the fencing matches. Although the NCAA ultimately revised its designated areas, there were no allegations that the NCAA knew that its former designated areas posed a risk to student-athletes. Here, the complaint alleges that the NCAA has known for decades the risks associated with concussive impacts but has failed to disclose such risks to student-athletes. Based on the allegations of the complaint, which we must accept as true, the foreseeability of the harm to student-football players, such as Schmitz, is far greater. Further, this foreseeability factor also weighs in favor of strong public policy to impose a duty on the NCAA to take reasonable measures to guard against such risks.

athletes." *Id.* at 553. In the instant case, however, we cannot yet reach that same conclusion after construing the allegations of the complaint in a light most favorable to the plaintiffs. Further, "a complaint need not contain every factual allegation that the complainant intends to prove, as such facts may not be available until after discovery." *Landskroner v. Landskroner*, 154 Ohio App.3d 471, 2003-Ohio-5077, 797 N.E.2d 1002, ¶ 50 (8th Dist.).

**{¶53}** Here, the complaint alleges a scenario where (1) the NCAA voluntarily oversees and promulgates the rules and regulations for college football for the purpose of providing a competitive environment that is safe and ensures fair play, (2) that it knew of the risks of concussive and subconcussive impacts yet failed to warn or disclose such risks to Schmitz, (3) that it failed to promulgate rules to protect against such risks, and (4) that it placed its economic interests over Schmitz's safety, who in turn developed the latent brain disease of CTE. The complaint further alleges that "Schmitz relied upon the guidance, expertise, and instruction" of the NCAA regarding "the serious and life-altering medical issue of concussive and sub-concussive risk in football." The issue of whether plaintiffs can actually prove these allegations is not before us at this time. Applying Ohio's liberal pleading standard, we find that the trial court erred in dismissing the negligence claim at this stage in the proceedings. We cannot say that there is no set of facts consistent with plaintiffs' complaint that would impose a legally recognized duty upon the NCAA.

### C. Fraud

**{¶54}** Plaintiffs have also pleaded two types of fraud: fraudulent concealment and constructive fraud.

*1. Fraudulent Concealment*

**{¶55}** NCAA moved to dismiss plaintiffs' fraudulent concealment claim solely on the grounds that neither Ohio nor Indiana recognize a cognizable cause of action for "fraudulent concealment" or "fraud by concealment." We disagree.

**{¶56}** Under Ohio law, common law fraud requires proof of the following elements:

> (a) a representation or, where there is a duty to disclose, concealment of a fact, (b) which is material to the transaction at hand, (c) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred, (d) with the intent of misleading another into relying upon it, (e) justifiable reliance upon the representation or concealment, and (f) a resulting injury proximately caused by the reliance.

*Russ v. TRW, Inc.*, 59 Ohio St.3d 42, 49, 570 N.E.2d 1076 (1991).

**{¶57}** Although generally captioned simply as a "fraud claim," Ohio courts have consistently recognized "fraud by concealment" or "fraudulent concealment" when the fraud claim raises the issue of concealing a fact when a duty to disclose exists. *See, e.g., Lundeen v. Smith-Hoke,* 10th Dist. Franklin No. 15AP-236, 2015-Ohio-5086; *Layman v. Binn*, 35 Ohio St.3d 176, 519 N.E.2d 642 (1988); *Davis v. Kempfer*, 3d Dist. Union No. 14-95-31, 1996 Ohio App.

LEXIS 1725 (Apr. 10, 1996); *see also Wilkey v. Hull*, 366 Fed.Appx. 634, 2010 U.S. App. LEXIS 3813 (6th Cir.2010) (discussing a claim for fraudulent concealment under Ohio law and applying fraud elements). The same applies under Indiana law. *See, e.g., Wright v. Pennamped*, 657 N.E.2d 1223, 1231 (Ind.App.1995) (recognizing an actionable claim for fraudulent concealment where there is a "duty to speak"); *Grow v. Indiana Retired Teachers Community*, 149 Ind.App. 109, 118, 271 N.E.2d 140 (1971) ("It is the law in Indiana that the failure to disclose all material facts, by a party on whom the law imposes a duty to disclose, constitutes actionable fraud. (Citations omitted). It is equally clear that the burden to show a duty to disclose is upon the party asserting fraudulent concealment."); *Loer v. Neal*, 127 Ind.App. 246, 254-255, 137 N.E.2d 728 (1956).[8]

{¶58} Despite not raising this argument in the trial court below, the NCAA now argues on appeal that the complaint is "completely devoid of any particularized allegations that the NCAA intended to deceive Schmitz into engaging in conduct which the NCAA knew would be harmful." The NCAA contends that the claim therefore failed to comply with Civ.R. 9(B), thereby justifying the trial court's dismissal of the claim. We disagree.

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[8] While we acknowledge that "fraudulent concealment" is an equitable tolling doctrine under Indiana law, we do not agree that Indiana courts refuse to recognize a claim of fraud based on a defendant's act of concealing a fact when a duty to disclose exists. To the extent that the NCAA moved to dismiss Count II — a fraud claim captioned "Fraud by Concealment/Fraudulent Concealment" — solely on the grounds that neither Indiana nor Ohio recognize such a claim, we find its argument fails.

{¶59} As to this element of the claim, the complaint specifically alleges, among other things, the following:

> (1) The NCAA "knew that repetitive head impacts in football games and full-contact practices created a substantial risk of harm to student-athletes that was similar or identical to the risk of harm to boxers who receive repetitive impacts to the head during boxing practices and matches, and professional football players, many of whom were forced to retire from professional football because of head injuries."
>
> (2) Despite such knowledge and awareness, NCAA "concealed these risks from their football players," including Schmitz, with the intent of misleading Schmitz "into believing he was safe and that he would not suffer any long-term debilitating cognitive injuries from playing football."
>
> (3) The NCAA "intentionally concealed * * * the risks of concussive and sub-concussive impacts in NCAA games and practices, including the risks associated with returning to physical activity too soon after sustaining a sub-concussive or concussive impact."

{¶60} The complaint further alleges that although the NCAA "knew for decades of the harmful effects of concussive and sub-concussive events on student-athletes," including Schmitz, it ignored these facts and failed to institute a meaningful method of warning and/or protecting the football players, "most likely because the revenue from football was so great, and the business of college football so profitable."

{¶61} We find these allegations are sufficient to support the intent element of the fraud claim. Again, whether plaintiffs can actually prove these allegations is a separate issue not before us. Instead, as stated above, we must presume these allegations to be true for the purposes of examining a Civ.R.

12(B)(6) motion to dismiss. Thus, because plaintiffs sufficiently pleaded facts to support the intent element of a fraudulent concealment claim, we find no merit to the NCAA's argument and hold that the trial court erred in dismissing the claim.

*2. Constructive Fraud*

**{¶62}** The NCAA moved to dismiss plaintiffs' constructive fraud claim on the grounds that plaintiffs failed to satisfy Civ.R. 9(B) and plead the claim with the requisite particularity. Specifically, NCAA argued that plaintiffs "failed to plead a specific fiduciary or other special relationship recognized by law with the NCAA that could give rise to a claim for constructive fraud." We agree.

**{¶63}** Constructive fraud is defined as "a breach of a legal or equitable duty, which, irrespective of moral guilt of the fraud feasor, the law declares fraudulent, because of its tendency to deceive others, to violate public or private confidence, or to injure public interests." *Cohen v. Estate of Cohen*, 23 Ohio St.3d 90, 91-92, 491 N.E.2d 698 (1986). Unlike actual fraud, "'[c]onstructive fraud does not require proof of fraudulent intent.'" *Id.*, quoting *Perlberg v. Perlberg*, 18 Ohio St.2d 55, 58, 247 N.E.2d 306 (1969). A claim for constructive fraud, however, is dependent on a special confidential or fiduciary relationship, thereby giving rise to a duty to disclose. *Cohen* at 92.

**{¶64}** A fiduciary relationship is defined as one in which "special confidence and trust is reposed in the integrity and fidelity of another and there

is a resulting position of superiority or influence, acquired by virtue of this special trust." *Federated Mgt. Co. v. Coopers & Lybrand*, 137 Ohio App.3d 366, 384, 738 N.E.2d 842 (10th Dist.2000), citing *Ed Schory & Sons, Inc. v. Soc. Natl. Bank*, 75 Ohio St.3d 433, 442, 662 N.E.2d 1074 (1996). But "the duty to speak does not necessarily depend on the existence of a fiduciary relationship." *Starinki v. Pace*, 41 Ohio App.3d 200, 203, 535 N.E.2d 328 (9th Dist.1987), citing *Cent. States Stamping Co. v. Terminal Equip. Co.*, 727 F. 2d 1405 (6th Cir.1984). "It may arise in any situation where one party imposes confidence in the other because of that person's position, and the other party knows of this confidence." *Terminal Equip. Co.* at 1409.

**{¶65}** Plaintiffs argue that the complaint sufficiently meets the "special relationship" requirement to support a constructive fraud claim based on their allegations describing (1) the NCAA's duty to protect Schmitz according to their contract, (2) the NCAA's superior knowledge, (3) Schmitz's reliance on such knowledge, and (4) the "unique relationship" between Schmitz and the NCAA, "which, among other things, regulated" Schmitz's participation in football.

**{¶66}** But unlike plaintiffs' negligence claim, the fraud claim must be pled with particularity pursuant to Civ.R. 9(B). Plaintiffs' broad statements simply do not establish a "special relationship" under the law that would support a constructive fraud claim. To suggest that the NCAA maintains a "special relationship" akin to a fiduciary relationship with all of its 400,000

students who participate in intercollegiate athletics is simply not supported under the law. *See, e.g., Flood v. Natl. Collegiate Athletic Assn.*, M.D.Pa. No. 1:15-CV-890, 2015 U.S. Dist. LEXIS 134016 (Aug. 26, 2015) ("[W]hile the NCAA oversees some aspects of intercollegiate athletics it is not a fiduciary for the thousands of student athletes who participate in those sports, and may not be held to the legal standards of a fiduciary relationship."); *Knelman v. Middlebury College*, 898 F.Supp.2d 697, 718 (D.Vt.2012) (declining to impose a fiduciary relationship where the fiduciary would be required to protect diverse needs and interests, creating possibly unlimited liability); *see also Valente v. Univ. of Dayton*, 438 Fed.Appx. 381 (6th Cir.2011) ("Although the 'fiduciary relationship' definition is somewhat vague, our search of Ohio case law yields no instances where courts have applied it to the university-student context.").

**{¶67}** Thus, because the complaint fails to plead a specific fiduciary or other special relationship recognized by law that could give rise to a claim for constructive fraud, we find that the trial court properly dismissed this claim.

**D. Loss of Consortium**

**{¶68}** Having found that the negligence and fraudulent concealment claims survive the NCAA's motion to dismiss, we likewise find that the trial court erred in dismissing Yvette Schmitz's loss of consortium claim against the NCAA. *See Bowen v. Kil-Kare, Inc.*, 63 Ohio St.3d 84, 93, 585 N.E.2d 384 (1992), *rehearing denied*, 63 Ohio St.3d 1442, 589 N.E.2d 46 ("a claim for loss

of consortium is derivative in that the claim is dependent upon the defendant's having committed a legally cognizable tort upon the spouse who suffers bodily injury"). Additionally, because the plaintiffs pleaded cognizable torts against Notre Dame that are not time-barred, we further find that Yvette's loss of consortium claim against Notre Dame should not have been dismissed.

{¶69} In conclusion, we find that the trial court properly dismissed plaintiffs' breach of contract claims against both defendants as being time-barred and the claim for constructive fraud against NCAA only. As to the remaining claims, namely, negligence against both defendants, fraudulent concealment against both defendants, constructive fraud against Notre Dame only, and loss of consortium against both defendants, we find that the trial court erred in dismissing those claims at this stage.

{¶70} Judgment affirmed in part, reversed in part, and remanded to the lower court for further proceedings consistent with this opinion.

It is ordered that appellees and appellants share the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARY J. BOYLE, JUDGE

LARRY A. JONES, SR., A.J., and
FRANK D. CELEBREZZE, JR., J., CONCUR

FILED AND JOURNALIZED
PER APP.R. 22(C)

DEC 08 2016

CUYAHOGA COUNTY CLERK
OF THE COURT OF APPEALS
By _____ Deputy

# EXHIBIT "C"

IN THE COURT OF COMMON PLEAS CUYAHOGA COUNTY, OHIO

| | |
|---|---|
| STEVEN SCHMITZ and YVETTE SCHMITZ,<br><br>Plaintiffs,<br><br>v.<br><br>NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, AND UNIVERSITY OF NOTRE DAME,<br><br>Defendants. | No. CV 14 834486<br><br>JURY DEMAND ENDORSED HEREON |

**FIRST AMENDED COMPLAINT**

The Plaintiffs, STEVEN AND YVETTE SCHMITZ, by and through undersigned counsel, bring this Complaint against the Defendants, the National Collegiate Athletic Association ("NCAA") and the University of Notre Dame ("Notre Dame"), and allege, upon facts and information and belief as follows.

**Introduction**

1. This case arises from the NCAA's and Notre Dame's (collectively referred to as "Defendants") reckless disregard for the safety of amateur collegiate football players generally and specifically for the safety of Plaintiff Steve Schmitz, a former running back and receiver for the Notre Dame football team between 1974 and 1978.

2. Notre Dame, its football coaches, athletic directors, and trainers, and the NCAA failed to notify, educate, and protect the plaintiff Steve Schmitz (and others) regarding the debilitating long-term dangers of concussions, concussion-related impacts, and sub-concussive impacts that result every day from amateur athletic competition in the form of football at the collegiate level.

3. The pathological and debilitating effects of mild traumatic brain injuries (referenced herein as "MTBI") caused by concussive and sub-concussive impacts have afflicted, and currently afflict, former and present collegiate football players, including the Plaintiff Steve Schmitz, who is permanently disabled and suffers substantial symptoms of neuro-cognitive injuries, including symptoms of traumatic encephalopathy. Those injuries were caused or substantially caused by the repetitive head impacts Steve Schmitz sustained as a four year football player at Notre Dame.

4. The published medical literature, as detailed later in this Complaint, contains studies of athletes dating back as far as 1928 and demonstrates a scientifically-observed link between repetitive blows to the head and short-term and long-term neuro-cognitive problems.

5. The earliest studies focused on boxers, but at least by 1933 and through the 1940s, 1950s, 1960s, 1970s, and 1980s, a substantial body of medical and scientific evidence had been developed specifically relating to brain injuries in the sport of football.

6. Moreover, many NCAA member institutions, including Defendant Notre Dame, characterize themselves as institutions of higher learning on the leading edge of developing knowledge. Many of the NCAA's institutions offer undergraduate and graduate courses in neuro-science and operate large medical research hospitals and facilities that include departments of neurology, neurosurgery, and psychiatry.

7. The NCAA's access to and relationship with such member institutions places it in a unique position to understand the dangers of concussions and sub-concussive impacts and to use that information for the benefit of collegiate athletes, particularly football players.

8. Defendant Notre Dame offers courses and an undergraduate degree in neuroscience, which placed and places Notre Dame in a unique vantage point to understand the

damages of concussions in college sports, particularly football, and to disseminate such information to those students most at risk for concussive and sub-concussive impacts in amateur football, particularly players on the Notre Dame football team.

9. Defendants, therefore, have been in a unique position to be cognizant of the body of scientific evidence and its compelling conclusions that college football players are at greater risk for chronic brain injury, illness, and disability both during their football careers and later in life. The Defendants also had and have the resources and power to implement measures to prevent or minimize the risk that Notre Dame football players specifically, and NCAA football players generally, will sustain debilitating long-term brain injuries.

10. Notwithstanding the body of known scientific evidence and the resources and power possessed by the Defendants, the Defendants orchestrated an approach to football practices and games that

(a) ignored the medical risks to Steve Schmitz and other Notre Dame football players;

(b) aggravated and enhanced the medical risks to Steve Schmitz and other football players;

(c) failed to educate Steve Schmitz and other Notre Dame football players of the link between concussive and sub-concussive impacts in amateur football and chronic neurological damage, illnesses, and decline; and

(d) failed to implement or enforce any system that would reasonably have mitigated, prevented, or addressed concussive and sub-concussive impacts suffered by Steve Schmitz.

11. As a direct result of the Defendants' tortious actions, Plaintiff Steve Schmitz suffers from, among other things, neurological and cognitive damage that have resulted in full disability at age 58.

## Parties

### A. Plaintiffs

12. Plaintiff Steve Schmitz is an individual who resides in Cleveland, Ohio.

13. Plaintiff Yvette Schmitz is married to Steve Schmitz and lives in the same home.

14. Steve Schmitz is a graduate of Defendant Notre Dame, where he played varsity football for four seasons.

15. Before attending Notre Dame, Steve Schmitz was a student at St. Edward High School in Lakewood, Ohio and was an outstanding football player.

16. While Steve Schmitz was playing high school football, representatives of the Defendant Notre Dame football program, including the Head Coach, visited him in Cleveland to convince him to attend Notre Dame and play football for the program. In the spring of 1974, during his senior year of high school, Steve Schmitz signed a "letter of intent" in Cleveland, Ohio to attend Defendant Notre Dame and play college football for Notre Dame. In exchange, Steve Schmitz received a scholarship and the right to attend the university.

17. The scholarship was conditioned on his participation on the Notre Dame football team, and Plaintiff Steve Schmitz would forfeit his ability to attend Notre Dame on scholarship if he left or was cut from the football team.

18. At no time during his participation on the Notre Dame football team was Plaintiff Steve Schmitz in a position to understand or appreciate the risks of concussive and sub-concussive impacts. At no time did Plaintiff Steve Schmitz ever have the knowledge or authority

to impose and implement for the Notre Dame football team health-related measures, treatment, and protocols to prevent, minimize, and/or treat concussive and sub-concussive impacts.

19. Soon after Steve Schmitz graduated from college, he stopped playing football and obtained employment in various companies in the Cleveland region of Ohio. Currently, Steve Schmitz is 58 years old and is not employable. He has been diagnosed with severe memory loss, cognitive decline, Alzheimer's, traumatic encephalopathy, and dementia, all of which have been caused, aggravated, and/or magnified by the repetitive concussive blows and/or sub-concussive blows to the head he suffered while playing running back and receiver on the Notre Dame college football team.

20. More specifically, the first time that Plaintiffs Steve and Yvette Schmitz were informed by competent medical authority that Steve Schmitz had suffered a brain injury related to playing football was on December 31, 2012, when they received the diagnosis from the Cleveland Clinic that Steve Schmitz suffered from traumatic encephalopathy.

21. Traumatic encephalopathy is Chronic Traumatic Encephalopathy (or "CTE"), the signature latent disease of chronic head impacts in football.

22. Prior to that date, Steve Schmitz did not know and had no grounds to believe that he had suffered a latent injury caused by playing football.

**B. Defendants**

23. Defendant NCAA is an unincorporated association with its principal office located in Indianapolis, Indiana and with member institutions in every state. The NCAA is the governing body of collegiate athletics and oversees twenty-three college sports and over 400,000 students who participate in intercollegiate athletics. More than 1,000 colleges are

members of the NCAA and submit to NCAA authority on that basis, including but not limited to the Defendant Notre Dame.

24. In 2010, the NCAA entered into an exclusive television and media rights contract with CBS and Turner Broadcasting. Over the 14-year term contract, the NCAA is to receive $10.8 billion. Similarly, in 2011, the NCAA entered into a multi-media agreement with ESPN, which is to provide for payments totaling $500,000,000 over the life of the 14-year contract.

25. In 2012, the NCAA's total revenues exceeded $838,000,000.

26. Defendant Notre Dame University is a private not-for-profit university located in Notre Dame, Indiana, near South Bend. Its own mission statement describes Notre Dame as a "...Catholic academic community of higher learning...dedicated to the pursuit and sharing of truth for its own sake."

27. Notre Dame is operated and controlled by a Board of Trustees, but ultimately by the Board of Fellows, a group of six Order of the Holy Cross religious members and six lay members who have final say over the operation of Notre Dame.

28. As a member of the NCAA, and as a private institution of higher learning, Notre Dame had (and still has) co-extensive control over the implementation of NCAA rules and regulations, its own rules and regulations, and co-extensive responsibility to notify, educate, and protect the plaintiff Steve Schmitz, both before and after he played for the Notre Dame football team, regarding the debilitating short-term and long-term dangers of concussions, and concussive and sub-concussive impacts.

29. On information and belief, Notre Dame generates from football alone $78 million in gross revenue and $46 million in profit every year, for which Notre Dame pays no taxes. According to Forbes Magazine, the Notre Dame football program is currently valued at $117 million.

According to Forbes, the Notre Dame football program is the second most valuable college football program in the world. The University of Texas is first.

30. In 2013, NBC Sports Group announced a 10-year contract extension to televise Notre Dame football games, doubling the length of its previous agreement. NBC and Notre Dame said the extension would begin in 2016 and run through the 2025 season. The contract is worth $15 million annually for football.

31. The President of Notre Dame, John Jenkins, controls all intercollegiate athletics at Notre Dame, and the Athletic Director reports directly to the President.

32. On information and belief, the current Head Coach of the Notre Dame football program receives an annual salary of approximately $3,000,000, which is on information and belief is approximately six times the salary of the President (or any other academic officer) of Notre Dame.

**Jurisdiction And Venue**

33. This Court has jurisdiction pursuant to Section 2305.01 of the Ohio Revised Code. This Court also has subject matter jurisdiction over this case, because the plaintiffs are citizens of Ohio, and the Defendant NCAA is a citizen of the State of Ohio, because it has member institutions within this state. Moreover, Defendant Notre Dame conducted business activities with this state and county when it recruited Plaintiff Steve Schmitz to play football at Notre Dame. On information and belief, it continues to engage in similar activity.

34. Venue is proper in this Court pursuant to Rule 3 (B) (3) and (7) of the Ohio Rules of Civil Procedure.

## Factual Allegations Common to All Counts

35. Combined, the Defendants generate hundreds of millions of dollars in annual profits by organizing, sponsoring, and staging amateur football games with enrolled student-athletes, almost all of whom are between 18 and 22 years of age.

36. Medical science, including world-renowned departments of medicine in NCAA member institutions, has known for many decades that repetitive and violent jarring of the head or impact to the head can cause sub-concussive and/or concussive impacts with a heightened risk of long term, chronic neuro-cognitive sequelae. Many of the member institutions of the Defendant NCAA, including the Defendant Notre Dame, offer and have offered academic and/or professional programs in neuroscience, psychology and/or psychiatry for many years.

37. The American Association of Neurological Surgeons (the "AANS") has defined a concussion as "a clinical syndrome characterized by an immediate and transient alteration in brain function, including an alteration of mental status and level of consciousness, resulting from mechanical force or trauma." The AANS defines traumatic brain injury ("TBI") as:

> a blow or jolt to the head, or a penetrating head injury that disrupts the normal function of the brain. TBI can result when the head suddenly and violently hits an object, or when an object pierces the skull and enters brain tissue. Symptoms of a TBI can be mild, moderate or severe, depending on the extent of damage to the brain. Mild cases may result in a brief change in mental state or consciousness, while severe cases may result in extended periods of unconsciousness, coma or even death.

38. The Defendants have known (or should have known) for many years that sub-concussive and concussive brain blows generally occur when the head either accelerates rapidly and then is stopped, or is rotated rapidly. The results frequently include, among other things, confusion, disorientation, blurred vision, ringing in the ears, memory loss, nausea, and sometimes unconsciousness.

39. The Defendants have known (or should have known) for many years that medical evidence has shown that symptoms of sub-concussive and/or concussive brain impacts can appear hours or days after the impact, indicating that the impacted party has not healed from the initial blow.

40. The Defendants have known (or should have known) for many years that once a person suffers sub-concussive and/or concussive brain impacts , that person is up to four times more likely to sustain a second event. Additionally, the Defendants have known (or should have known) for decades that even a single sub-concussive or concussive blow may cause brain injury, and the injured person often requires substantial time to recover.

41. The Defendants have known (or should have known) for many years that neuropathology studies, brain imaging tests, and neuropsychological tests on boxers and former football players, including former NCAA players, have established that both boxers and football players who sustain repetitive head impacts are exposed to an elevated risk of developing any one or more of the following conditions: early-onset of Alzheimer's Disease, dementia, depression, deficits in cognitive functioning, reduced processing speed, decline in attention and reasoning, loss of memory, sleeplessness, mood swings, personality changes, and the debilitating and latent disease known as CTE. The latter condition involves the slow build-up of the Tau protein within the brain tissue that causes diminished brain function, progressive cognitive decline, and many of the symptoms listed above. CTE is also associated with an increased risk of suicide.

42. Published peer-reviewed scientific studies have shown that concussive and sub-concussive head impacts while playing football, including amateur football, are linked to significant risk for permanent brain injury.

43. Steve Schmitz was subjected to repetitive concussive and sub-concussive impacts in practices and games for the profit and promotion of the Defendants, yet he was never aware of the short-term and long-term health risk associated with concussive and sub-concussive impacts, was never educated by the Defendants regarding the risk, and was never furnished with appropriate health and safety protocols that would monitor, manage, and mitigate the risks associated with concussive and sub-concussive impacts while he played amateur football at Notre Dame.

**The Purported Mission to Protect Student Athletes**

44. Formerly known as the Intercollegiate Athletic Association of the United States, the NCAA was formed in 1906 purportedly to protect college students from dangerous athletic practices.

45. At the turn of the 20th Century, an alarming rate of deaths due to head injuries were occurring in college football. President Theodore Roosevelt convened a group of Ivy League Presidents and coaches to discuss how the game could be made safer. As a result of several subsequent meetings of colleges, the Intercollegiate Athletic Association of the United States „ formed (IAAUS). In 1910, the IAAUS changed its name to the National Collegiate Athletic Association.

46. The NCAA's founding purpose to protect student-athletes has been repeated often, and as far back as 1909 at the annual convention of member institutions. There, Chancellor James Roscoe Day of Syracuse University stated:

> The lives of the students must not be sacrificed to a sport. Athletic sports must be selected with strict regard to the safety of those practicing them. It must be remembered that the sport is not the end. It is incidental to another end far more important. We lose sight of both the purpose and the proportion when we sacrifice the student to the sport.

47. Thus, since its inception, Defendant NCAA has held itself out as the supervisory force over conduct at intercollegiate events and practices throughout the country and shouldered a legal duty to protect student-athletes, including Steve Schmitz.

48. According to its website, Defendant NCAA was founded "*to protect* young people from the dangerous and exploitive athletic practices of the time." This core purpose is emphasized on the NCAA's website:

> Part of the NCAA's core mission is to provide student-athletes with a competitive environment that is safe and ensures fair play. While each school is responsible for the welfare of its student-athletes, the NCAA provides leadership by establishing safety guidelines, playing rules, equipment standards, drug testing procedures and research into the cause of injuries to assist decision making. By taking proactive steps to student -athletes' health and safety, we can help them enjoy a vibrant and fulfilling career.

49. The NCAA's purported commitment to safeguarding its student-athletes is expressed throughout the NCAA Constitution. The NCAA Constitution clearly defines the NCAA's purpose and fundamental policies to include maintaining control over and responsibility for intercollegiate sports and student-athletes. The NCAA Constitution states in pertinent part:

> The purposes of this Association are:
>
> (a) To initiate, stimulate and improve intercollegiate athletics programs for student athletes;
> (b) To uphold the principal of *institutional control* of, and responsibility for, all intercollegiate sports in conformity with the constitution and bylaws of this association; . . .

NCAA Const., Art. 1, § 1.2(a)(b).

50. The NCAA Constitution also defines one of its "Fundamental Policies" as the requirement that "Member institutions shall be obligated to apply and enforce this legislation, and the enforcement procedures of the Association shall be applied to an institution when it fails to fulfill this obligation." NCAA Const., Art. 1, § 1.3.2.

51. Article 2.2 of the NCAA Constitution specifically governs the "Principle of Student-Athlete Well-Being," and provides in pertinent part:

> **2.2. The Principle of Student-Athlete Well-Being**
> Intercollegiate athletics programs shall be conducted in a manner designed to protect and enhance the physical and educational well-being of student athletes. (Revised: 11/21/05.)
>
> 2.2.3 **Health and Safety.** It is the responsibility of each member institution to protect the health of, and provide a safe environment for, each of its participating student athletes. (Adopted: 1/10/95.)

52. The NCAA Constitution also mandates that "each member institution must establish and maintain an environment in which a student-athlete's activities are conducted as an integral part of the student-athlete's educational experience." NCAA Const., Art. 2, § 2.2.1 (Adopted: 1/10/95).

53. To accomplish this purported purpose, Defendant NCAA promulgates and implements standard sport regulations and requirements, such as the NCAA Constitution, Operating Bylaws, and Administrative Bylaws. These NCAA documents provide detailed instructions on game and practice rules, player eligibility, scholarships, and player well-being and safety. NCAA member institutions are required to abide by the NCAA rules and requirements.

54. The NCAA publishes a health and safety guide termed the Sports Medicine Handbook (the "Handbook"). The Handbook, which is produced annually, includes the NCAA's official policies and guidelines for the treatment and prevention of sports-related injuries, as well as return-to-play guidance, and recognizes that "student-athletes rightfully assume that those who sponsor intercollegiate athletics have taken reasonable precautions to minimize the risk of injury from athletics participation."

55. To aid member institutions with the tools that they need to comply with NCAA

legislation, the NCAA Constitution promises that the "...Association shall assist the institution in its efforts to achieve full compliance with all rules and regulations...."

56. The NCAA, therefore, holds itself out as both a proponent of and authority on the treatment and prevention of sports-related injuries upon which student-athletes and member institutions can rely upon for guidance on player-safety issues. The NCAA has expressly and implicitly assumed a duty of care to the student-athletes it promised to protect.

57. As a member institution, Notre Dame was charged with implementing and enforcing those guidelines in a meaningful way to protect the health and safety of Notre Dame football players, including Steve Schmitz.

58. The NCAA, however, long ago shirked its legal duty, as did Notre Dame, which actively compelled and promoted its players to inflict head injuries on opponents and, therefore, themselves. For that and many other reasons set forth in this Complaint, the NCAA and its member institutions, particularly Notre Dame, have lost sight of the founding principles. Steve Schmitz's neuro-cognitive health has been sacrificed as part of the process, exclusively for the business of college football and the millions of dollars in profit the NCAA and Notre Dame reap every year from the Notre Dame football program.

**Notre Dame Football Fostered and Aggravated Head Injuries**

59. For more than 40 years, coaches around the country have known that a football player should not lead with his helmeted head. In 1967 the American Medical Association Committee on Medical Aspects of Sports declared that coaches should not teach players to lead with their head. By 1976, the NCAA and the National Federation of State High School Associations passed a safety rule prohibiting initial contact with the head.

60. Despite this elementary rule, the Notre Dame coaching staff (a) did nothing to

protect the neuro-cognitive health of Steve Schmitz, and (b) never at any time discouraged players from leading with their helmets when tackling and blocking.

61. On information and belief, the Notre Dame coaching staff accepted, praised, and rewarded tackling and blocking techniques that involved the use of the helmeted head against opposing players and teammates.

62. As a result, it was a common method during Notre Dame football games and practices for players to use their helmeted heads when tackling and blocking, to inflict on each other and opponents helmet to helmet hits of all kinds, including concussive and sub-concussive head injuries for which they were never monitored or treated. This practice by the Notre Dame football coaches, and the Notre Dame football program aggravated the risk to Steve Schmitz and other Notre Dame football players for the following reasons:

(a) the Notre Dame players were taught and/or encouraged and/or not discouraged to play the game by using their helmeted heads as a weapon and/or implement that would injure opponents and themselves; and

(b) the Notre Dame football players were taught and required to continue to play in games and practices after they had sustained concussion symptoms, which were never recognized, addressed, or treated.

63. If, for example, during practices or games a player on impact had their "bell rung" and/or was temporarily unaware of his surroundings, this meant nothing to the Notre Dame coaching staff. Players were ordered and expected to continue to participate in the practice or game. If a player failed to continue to participate or otherwise failed to abide by the coaches' instructions, the player risked his place on the Notre Dame football team, his scholarship, and his contractual right to attend classes at Notre Dame.

64. For four years, Steve Schmitz participated in full contact tackling drills, practices, scrimmages, and games at Notre Dame. On many occasions in drills, practices, and games, he experienced concussion symptoms, including but not limited to being substantially disoriented as to time and place.

65. At no time, however, were the symptoms that Steve Schmitz demonstrated recognized either by him or the Notre Dame coaching staff as an injury that should be monitored, treated, or even acknowledged.

66. At no time while Steve Schmitz played football at Notre Dame did a Notre Dame football coach or trainer advise or send Steve Schmitz to see a neurologist to test for concussion symptoms or neuro-cognitive health.

67. At no time while Steve Schmitz played football at Notre Dame did anyone (a) test or examine Steve Schmitz for concussion symptoms; (b) advise or educate Steve Schmitz about what a concussion is; or (c) advise or educate Steve Schmitz about what concussion symptoms are.

68. At no time while Steve Schmitz played football at Notre Dame did either he or any football program staff recognize that Steve Schmitz sustained an injury to the head that required treatment, rest or therapy.

**The Defendants Knew or Should Have Known of the Risks to Steve Schmitz**

69. Both before and after Steve Schmitz played football at Notre Dame, the NCAA and Notre Dame knew or should have known of the mounting literature and medical advice regarding the latent effects of concussive and sub-concussive impacts and the need for disclosure to Notre Dame football players, pre-season baseline neuro-psychological testing, and safe return to play guidelines.

70. Beginning with studies on the brain injuries suffered by boxers in the 1920s, medical science has long recognized the debilitating effects of concussions, and found that that repetitive head impacts can cause permanent brain damage and increased risk of long-term cognitive decline and disability.

71. In 1928, pathologist Harrison Martland described the clinical spectrum of abnormalities found in "almost 50 percent of fighters [boxers] . . . if they ke[pt] at the game long enough" (the "Martland study"). The article was published in the *Journal of the American Medical Association*. The Martland study was the first to link sub-concussive blows and "mild concussions" to degenerative brain disease.

72. In 1937, the American Football Coaches Association published a report warning that players who suffer a concussion should be removed from sports demanding personal contact.

73. In 1948, the New York State Legislature created the Medical Advisory Board of the New York Athletic Commission for the specific purpose of creating mandatory rules for professional boxing designed to prevent or minimize the health risks to boxers. After a three year study, the Medical Advisory Board recommended, among other things, (a) an accident survey committee to study ongoing accidents and deaths in boxing rings; (b) two physicians at ring-side for every bout; (c) post-bout medical follow-up exams; (d) a 30-day period of no activity following a knockout and a medical follow up for the boxer, all of which was designed to avoid the development of "punch drunk syndrome," also known at the time as "traumatic encephalopathy"; (e) a physician's prerogative to recommend that a boxer surrender temporarily his boxing license if the physician notes that the boxer suffered significant injury or knockout; and (f) a medical investigation of boxers who suffer knockouts numerous times.

74. The recommendations were codified as rules of the New York State Athletic Commission.

75. In or about 1952, the *Journal of the American Medical Association* published a study of encephalopathic changes in professional boxers.

76. That same year, an article published in the *New England Journal of Medicine* recommended a three-strike rule for concussions in football (*i.e.*, recommending that players cease to play football permanently after receiving their third concussion.)

77. In 1962, Drs. Serel & Jaros looked at the heightened incidence of chronic encephalopathy in boxers and characterized the disease as a "Parkinsonian" pattern of progressive decline.

78. A 1963 study by Drs. Mawdsley & Ferguson published in *Lancet* found that some boxers sustain chronic neurological damages as a result of repeated head injuries. This damage manifested in the form of dementia and impairment of motor function.

79. A 1967 study Drs. Hughes & Hendrix examined brain activity impacts from football by utilizing EEG to read brain activity in game conditions, including after head trauma.

80. Also in 1967 the American Medical Association Committee on Medical Aspects of Sports declared that coaches should not teach players to lead with their head.

81. In 1969 (and then again in the 1973 book entitled *Head and Neck Injuries in Football*), a paper published in the *Journal of Medicine and Science in Sports* by a leading medical expert in the treatment of head injuries, recommended that any concussive event with transitory loss of consciousness requires the removal of the football player from play and requires monitoring.

82. In 1973, Drs. Corsellis, Bruton, & Freeman-Browne studied the physical neurological impact of boxing. This study outlined the neuropathological characteristics of "Dementia Pugilistica," including loss of brain cells, cerebral atrophy, and neurofibrillary tangles.

83. A 1975 study by Drs. Gronwall & Wrightson looked at the cumulative effects of concussive injuries in non-athletes and found that those who suffered two concussions took longer to recover than those who suffered from a single concussion. The authors noted that these results could be extrapolated to athletes given the common occurrence of concussions in sports.

84. By 1975, the number of head and neck injuries from football that resulted in permanent quadriplegias in Pennsylvania and New Jersey led to the creation of the National Football Head and Neck Registry, which was sponsored by the National Athletic Trainers Association and the Sports Medicine Center at the University of Pennsylvania.

85. In 1973, a potentially fatal condition known as "Second Impact Syndrome"—in which re-injury to the already-concussed brain triggers swelling that the skull cannot accommodate—was identified. It did not receive this name until 1984. Upon information and belief, Second Impact Syndrome has resulted in the deaths of at least forty football players.

86. By 1976, the NCAA and the National Federation of State High School Associations passed a safety rule prohibiting initial contact with the head. On information and belief, neither the NCAA nor the Notre Dame football coaches and athletic department ever implemented or enforced this rule both during or after Steve Schmitz played college football.

87. Between 1952 and 1994, numerous additional studies were published in medical journals including the *Journal of the American Medical Association*, *Neurology*, the *New England Journal of Medicine*, and *Lancet* warning of the dangers of single concussions, multiple

concussions, and/or football-related head trauma from multiple concussions. These studies collectively established that:

> repetitive head trauma in contact sports, including boxing and football, has potential dangerous long-term effects on brain function;
>
> encephalopathy (dementia pugilistica) is caused in boxers by repeated sub-concussive and concussive blows to the head;
>
> acceleration and rapid deceleration of the head that results in brief loss of consciousness in primates also results in a tearing of the axons (brain cells) within the brainstem;
>
> with respect to mild head injury in athletes who play contact sports, there is a relationship between neurologic pathology and length of the athlete's career;
>
> immediate retrograde memory issues occur following concussions;
>
> mild head injury requires recovery time without risk of subjection to further injury;
>
> head trauma is linked to dementia;
>
> a football player who suffers a concussion requires significant rest before being subjected to further contact; and,
>
> minor head trauma can lead to neuropathological and neurophysiological alterations, including neuronal damage, reduced cerebral blood flow, altered brainstem evoked potentials and reduced speed of information processing.

88. In the early 1980s, the Department of Neurosurgery at the University of Virginia, an NCAA member institution, published studies on patients who sustained MTBI and observed long-term damage in the form of unexpected cognitive impairment. The studies were published in neurological journals and treatises within the United States and received national attention.

89. In 1982, the University of Virginia and other institutions conducted studies on college football teams that showed that football players who suffered MTBI suffered pathological short-term and long-term damage. With respect to concussions, the same studies

showed that a person who sustained one concussion was more likely to sustain a second, particularly if that person was not properly treated and removed from activity so that the concussion symptoms were allowed to resolve.

90. The same studies showed that two or more concussions close in time could have serious short-term and long-term consequences in both football players and other victims of brain trauma.

91. In 1986, Dr. Robert Cantu of the American College of Sports Medicine published *Concussion Grading Guidelines*, which he later updated in 2001.

92. By 1991, three distinct medical professionals/entities, all independent from the NCAA—Dr. Robert Cantu of the American College of Sports Medicine, the American Academy of Neurology, and the Colorado Medical Society—developed return-to-play criteria for football players suspected of having sustained head injuries.

93. In 1999, the National Center for Catastrophic Sport Injury Research at the University of North Carolina conducted a study involving eighteen thousand (18,000) collegiate and high school football players. The research showed that once a player suffered one concussion, he was three times more likely to sustain a second in the same season.

94. In 2004, a convention of neurological experts in Prague met with the aim of providing recommendations for the improvement of safety and health of athletes who suffer concussive injuries in ice hockey, rugby, football, and other sports based on the most up-to-date research. These experts recommended that a player never be returned to play while symptomatic, and coined the phrase, "when in doubt, sit them out."

95. This echoed similar medical protocol established at a Vienna conference in 2001. These two conventions were attended by predominately American doctors who were experts and leaders in the neurological field.

96. The University of North Carolina's Center for the Study of Retired Athletes published survey-based papers in 2005 through 2007 that found a strong correlation between depression, dementia, and other cognitive impairment in professional football players and the number of concussions those players had received.

97. A 2006 publication stated that "[a]ll standard U.S. guidelines, such as those first set by the American Academy of Neurology and the Colorado Medical Society, agree that athletes who lose consciousness should never return to play in the same game."

98. Although the Defendants knew for decades of the harmful effects of concussive and sub-concussive events on student-athletes, they ignored these facts and failed to institute any meaningful method of warning and/or protecting the student-athletes, including the football players, most likely because the revenue from football was so great, and the business of college football so profitable.

99. On information and belief, during every decade referenced above, the Defendants NCAA and Notre Dame (including but not limited to its football program) had access to the foregoing information.

100. Information collected by the NCAA's own injury surveillance data confirmed that high rates of concussions and head injuries, with concussions accounting for 7% of all football practice and game injuries and between 7% and 14% of all hockey injuries in the 2005-2006 season.

101. In 2003, two separate studies partially funded by the NCAA concluded the following: (1) that athletes required a full seven days to regain their pre-concussion abilities after sustaining a concussion; and (2) that NCAA football players with a history of concussions were at an increased risk of sustaining additional future concussions, and thus, should receive more information about this risk before deciding whether to continue playing football. One of the studies further recommended the use of standardized assessment tools to guide medical staff in evaluating and treating student athletes.

**The NCAA and Notre Dame Ignored Mounting Medical Evidence and Refused to Implement Any of the Recommended Guidelines**

102. Despite the foregoing research studies and expert recommendations, the NCAA ignored the fact that member institutions encouraged and actually required players to play in the very same game or practice in which the player sustained a concussion or a likely concussion.

103. Despite the foregoing research studies and expert recommendations, Defendants NCAA and Notre Dame failed to implement any guidelines or rules to prevent repeated concussions and failed to educate players about the increased risk of concussive and sub-concussive injury in football, particularly under circumstances when the helmet is used as a weapon when tackling, blocking, or running with the football.

104. Despite the forgoing research, neither the NCAA nor Notre Dame recommended return to play procedures or took any action to educate student athletes subject to its rules on the risks of repeated head trauma.

105. Despite the foregoing research studies and expert recommendations, Notre Dame conducted a football program that proactively rewarded Steve Schmitz for inflicting head injuries on himself and others and compelled him to ignore concussion symptoms and

continue to play football within moments of sustaining concussion symptoms. Specifically, the Notre Dame coaches demanded that Notre Dame football players, including Steve Schmitz, sustain head injuries and inflict head injuries on other players for the purpose of advancing the Notre Dame football program by winning games, obtaining fame and favorable publicity, and gaining millions of dollars in revenue for Notre Dame.

106. Despite the foregoing research studies and expert recommendations, neither the NCAA nor Notre Dame ever contacted Steve Schmitz after he had graduated from Notre Dame to inform him that he had been exposed to an increased risk of long-term brain damage by the concussive and sub-concussive blows sustained while playing football for Notre Dame.

107. Later, after Steve Schmitz had left Notre Dame, neither Notre Dame nor the NCAA accepted or adopted any of the internationally accepted guidelines regarding concussion management and return to play protocols, thereby endorsing and allowing the ongoing practices of its member institutions, including Defendant Notre Dame. Rather, the NCAA rejected the international recommendations and continued to promote individualized approaches, such as the active encouragement by Notre Dame football that its student-athletes inflict head injuries on themselves and others during games and practices for the sole purpose of winning games, obtaining fame, and making money for Notre Dame.

108. On information and belief, Notre Dame continued to conduct its football program in the exact same way from 1979 through 2010 and, like the NCAA, ignored all medical evidence that required Notre Dame to fulfill its obligation to protect the neurological health of students who participated in the football program.

109. It was not until April 2010 that the NCAA made changes to its concussion treatment protocols, this time passing legislation that required its member institutions to have a Concussion Management Plan ("CMP") in place for all sports.

110. Under that new policy, schools were required to have a CMP on file "such that a student-athlete who exhibits signs, symptoms, or behaviors consistent with a concussion shall be removed from practice or competition and evaluated by an athletics healthcare provider with experience in the evaluation and management of concussions."

111. The policy further states that students diagnosed with a concussion "shall not return to activity for the remainder of that day" and that medical clearance would be determined by the team physician.

112. Finally, the policy required students to sign a statement "in which they accept the responsibility for reporting their injuries and illnesses, including signs and symptoms of concussion" to medical staff and noted that students would be provided educational materials on concussions during the signing process.

113. The policy was too late for Steve Schmitz.

114. Moreover, Defendant NCAA passed the responsibility for developing prevention and management procedures on to its member schools, such as the Defendant Notre Dame, and placed the burden of actively seeking medical attention on student-athletes, most of whom are less than 22 years old and are beholden to coaches for both a place on the team roster and the right to attend the school.

**COUNT I - NEGLIGENCE**
**(Plaintiff STEVE SCHMITZ Against the NCAA and NOTRE DAME)**

115. Plaintiff Steve Schmitz incorporates by reference as if fully set forth herein paragraphs 1 through 114 set forth above.

116. From its inception and by virtue of its role as the governing body in college athletics, the NCAA has historically assumed a duty to protect the health and safety of all student-athletes at member institutions. The NCAA also assumed a duty of care by voluntarily taking steps to protect and promote the health and safety of its players, including promulgating safety handbooks and regulations. That duty included an obligation to supervise, regulate, and monitor the rules of its governed sports, and provide appropriate and up-to-date guidance and regulations to minimize the risk of injury to football players.

117. Defendant Notre Dame also assumed similar duties to all its student athletes, including Steve Schmitz.

118. The duties of both Defendants included an obligation to supervise, regulate, and monitor the rules of the Notre Dame football program and provide appropriate and up-to-date guidance and regulations to minimize the risk of long-term and short-term brain damage to Notre Dame football players.

119. Defendant NCAA had an additional duty to educate Notre Dame and Notre Dame football players on the proper ways to evaluate and treat concussive events during football games and practices, including repetitive sub-concussive and concussive impacts. The NCAA's duty further included a duty to warn student athletes of the dangers of sub-concussive and concussive injuries and of the risks associated with football before, during, and after they played college football and as additional information came to light.

120. Both Defendants had a duty not to conceal material information from Notre Dame football players, including Steve Schmitz.

121. The Defendants jointly breached their duties to Steve Schmitz by failing to implement, promulgate, or require appropriate and up-to-date guidelines regarding the evaluation and

treatment of concussive and sub-concussive impacts on the playing field, in locker rooms, and in the weeks and months after a Notre Dame football player sustained an concussive and sub-concussive impacts, and the providing treatment for the latent effects of concussive and sub-concussive impacts. This failure includes, but is not limited to:

(a) failing to recognize and monitor concussive and sub-concussive injury during football practices and games;

(b) failing inform the student football players of the dangers of concussive and sub-concussive injuries;

(c) failing to implement return to play regulations for student football players who sustained concussive and/or sub-concussive injuries and/or is suspected of sustaining such injuries;

(d) failing to implement procedures to monitor the health of student football players who have sustained (or are suspected of sustaining) concussive and/or sub-concussive injuries;

(e) failing to inform the student football players' extended families of concussive and/or sub-concussive injuries the student football players had sustained; and

(f) failing to provide adequate notification, warning and treatment for latent neuro-cognitive and neuro-behavioral effects of concussive and sub-concussive injuries, after the time Steve Schmitz graduated from Notre Dame.

122. Both Defendants breached their duties to Steve Schmitz by fraudulently concealing and/or failing to disclose and/or failing to recognize and /or being willfully blind to: (a) material

information regarding the long-term risks and effects of repetitive head trauma they possessed or should have possessed; (b) the dangers of concussive and sub-concussive injuries; and (c) the proper ways to evaluate, treat, and avoid concussive and sub-concussive trauma to student football players.

123. Notre Dame, in particular, breached its duty to Steve Schmitz by actively teaching and encouraging Notre Dame football players to inflict concussions on themselves and others as an effective way to play football.

124. Steve Schmitz relied upon the guidance, expertise, and instruction of both Defendants regarding the serious and life-altering medical issue of concussive and sub-concussive risk in football.

125. At all times, the Defendants had superior knowledge of material information regarding the effect of repeated concussive events. Because such information was not readily available to Steve Schmitz, the Defendants knew or should have known that Steve Schmitz would act and rely upon the guidance, expertise, and instruction of the Defendants on this crucial medical issue, while at Notre Dame and thereafter.

126. Repetitive concussive and sub-concussive impacts during college football practices and games has a pathological and latent effect on the brain. Repetitive exposure to accelerations to the head causes deformation, twisting, shearing, and stretching of neuronal cells such that multiple forms of damage take place, including the release of small amounts of chemicals within the brain, such as Tau protein, which is a signature pathology of CTE, the same phenomenon as boxer's encephalopathy (or "punch drunk syndrome") studied and reported by Harrison Martland in 1928.

127. Plaintiff Steve Schmitz experienced repetitive sub-concussive and concussive brain impacts during his college football career. These impacts significantly increased his risk of developing neurodegenerative disorders and diseases, including but not limited to CTE, Alzheimer's disease, and other similar cognitive-impairing conditions.

128. The repetitive head accelerations and hits to which Steve Schmitz was exposed presented risks of latent and long-term debilitating chronic illnesses. Absent the defendant's negligence and concealment, the risks of harm to Steve Schmitz would have been materially lower, and Steve Schmitz would not have sustained the brain damage from which he currently suffers.

129. The repetitive concussive and sub-concussive impacts Steve Schmitz sustained while playing football at Notre Dame resulted in neuro-cognitive and neuro-behavioral changes over time in Steve Schmitz. Now, at age 58, Steve Schmitz is permanently disabled based on the latent effects of neuro-cognitive and neuro-behavioral injuries he sustained while playing football at Notre Dame. The latent injuries sustained by Steve Schmitz developed over time and were manifest later in life. They include, but are not limited to, varying forms of neuro-cognitive disability, decline, personality change, forgetfulness, early onset Alzheimer's Disease, and CTE, all of which will require future medical care. At no time prior to being diagnosed in December 2012 was Steve Schmitz aware that he had sustained a brain injury as a result of football.

130. As a direct and proximate result of the NCAA's and Notre Dame's negligence, Steve Schmitz has incurred damages in the form of permanent brain damage, emotional distress, past and future medical, health care, and home care expenses, other out of pocket expenses, lost time, lost future earnings, and other damages. Further, Steve Schmitz will likely incur future damages caused by the NCAA's and Notre Dame's negligence.

131. As a result of their misconduct, the Defendants NCAA and Notre Dame are liable to Plaintiff Steve Schmitz for the full measure of damages allowed under applicable law.

**COUNT II – FRAUD BY CONCEALMENT / FRAUDULENT CONCEALMENT**
**(Plaintiff STEVE SCHMITZ Against the NCAA and NOTRE DAME)**

132. Plaintiff Steve Schmitz incorporates by reference as if fully set forth herein paragraphs 1 through 131 set forth above.

133. Defendant NCAA and its member institutions, including Defendant Notre Dame, had a duty to protect their student athletes, which included, among other things, the duty to warn, disclose and/or otherwise speak to these student athletes, including Plaintiff Steve Schmitz, about the risk of harm and long-term health effects of repetitive concussive and sub-concussive impacts in playing football.

134. As early as 1933, and certainly between the early 1970s and the 1990s, which includes the time period within which Steve Schmitz played football at Defendant Notre Dame, the NCAA and Notre Dame knew that repetitive head impacts in football games and full-contact practices created a substantial risk of harm to student-athletes that was similar or identical to the risk of harm to boxers who receive repetitive impacts to the head during boxing practices and matches, and professional football players, many of whom were forced to retire from professional football because of head injuries.

135. The Defendants were aware of and understood the significance of the published medical literature described in the preceding paragraphs of this Complaint, which detailed the serious risk of short-term and long-term brain injury associated with repetitive traumatic impacts to the head to which Notre Dame football players are exposed.

136. Despite such knowledge and awareness, Defendants NCAA and Notre Dame concealed these risks from their football players, including Plaintiff Steve Schmitz, with the

intent of misleading their football players, including Plaintiff Steve Schmitz, into believing he was safe and that he would not suffer any long-term debilitating cognitive injuries from playing football.

137. Defendants NCAA and Notre Dame were willfully blind to and/or knowingly and intentionally concealed from NCAA football players generally, and Notre Dame football players specifically, the risks of concussive and sub-concussive impacts in NCAA games and practices, including the risks associated with returning to physical activity too soon after sustaining a sub-concussive or concussive impact Concealing and otherwise failing to disclose these risks to their football players, including Plaintiff Steve Schmitz, had the same force and effect of Defendants NCAA and Notre Dame misrepresenting facts to their football players, including Plaintiff Steve Schmitz.

138. Given the NCAA's and Notre Dame's superior and unique vantage point, Steve Schmitz reasonably looked to, and otherwise relied upon, the NCAA and Notre Dame for guidance on health and safety issues, such as disclosing to him and providing him with information, precautionary measures, and warnings about concussions, including the later-in-life consequences of the repetitive head impacts he sustained while a football player at Notre Dame.

139. As a direct and proximate result of Plaintiff Steve Schmitz's reliance upon Defendants NCAA and Notre Dame, Plaintiff Steve Schmitz has suffered and will continue to suffer substantial injuries, harm, emotional distress, pain and suffering, and economic and non-economic damages that are ongoing and continuing in nature.

140. As a direct and proximate result of the NCAA's and Notre Dame's knowing concealment and/or willful blindness, Plaintiff Steve Schmitz has suffered and will continue to

suffer substantial injuries, harm, emotional distress, pain and suffering, and economic and non-economic damages that are ongoing and continuing in nature.

141. As a result of the NCAA's and Notre Dame's misconduct, including the concealment of facts known to them, which they had a duty to disclose to their football players, including Plaintiff Steve Schmitz, the NCAA and Notre Dame are liable to Plaintiff Steve Schmitz for the full measure of damages allowed under applicable law.

**COUNT III – CONSTRUCTIVE FRAUD**
**(Plaintiff STEVE SCHMITZ vs. NCAA and NOTRE DAME)**

142. Plaintiff Steve Schmitz incorporates by reference as if fully set forth herein paragraphs 1 through 141 set forth above.

143. Defendant NCAA and its member institutions, including Defendant Notre Dame, had a duty to protect their student athletes, which included, among other things, the duty to warn, disclose and/or otherwise speak to these student athletes, including Plaintiff Steve Schmitz, about the risk of harm and long-term health effects of repetitive head injuries while playing football.

144. This duty arose by virtue of the contractual relationships set forth in the Counts below and the aforementioned reasons, as well the unique nature of the relationship between both Steve Schmitz and the University of Notre Dame, for whom he played college football, and Steve Schmitz and the NCAA, which, among other things, regulated Steve Schmitz' participation in the sport. As a result of these relationships, the NCAA and Notre Dame were in a position to take unfair advantage of Plaintiff Steve Schmitz.

145. As early as 1933, and certainly between the early 1970s and the 1990s, which includes the time period within which Steve Schmitz played football at Defendant Notre Dame, the NCAA and Notre Dame knew that repetitive head impacts in football games and full-contact practices created a substantial risk of harm to student-athletes that was similar or identical to the

risk of harm to boxers who receive repetitive impacts to the head during boxing practices and matches, and professional football players, many of whom were forced to retire from professional football because of head injuries.

146. The Defendants were aware of and understood the significance of the published medical literature described in the preceding paragraphs of this Complaint, which detailed the serious risk of short-term and long-term brain injury associated with repetitive traumatic impacts to the head to which Notre Dame football players are exposed.

147. Despite such knowledge and awareness, Defendants NCAA and Notre Dame concealed and/or otherwise withheld information regarding these risks from their football players, including Plaintiff Steve Schmitz, leading Plaintiff Steve Schmitz to believe he was safe and that he would not suffer any long-term debilitating cognitive injuries from playing football.

148. Defendants NCAA and Notre Dame concealed and/or otherwise withheld from NCAA football players generally, and Notre Dame football players specifically, the risks of concussive and sub-concussive impacts in NCAA games and practices, including the risks associated with returning to physical activity too soon after sustaining a sub-concussive or concussive event. Concealing and otherwise failing to disclose these risks to their football players, including Plaintiff Steve Schmitz, had the same force and effect of Defendants NCAA and Notre Dame misrepresenting facts to their football players, including Plaintiff Steve Schmitz.

149. Given the NCAA's and Notre Dame's superior and unique vantage point, Steve Schmitz reasonably looked to, and otherwise relied upon, the NCAA and Notre Dame for guidance on health and safety issues, such as disclosing to him and providing him with information, precautionary measures warnings about head injuries and concussions, including the

later-in-life consequences of the repetitive head impacts he sustained while a football player at Notre Dame.

150. As a direct and proximate result of Plaintiff Steve Schmitz's reliance upon Defendants NCAA and Notre Dame, Plaintiff Steve Schmitz has suffered and will continue to suffer substantial injuries, harm, emotional distress, pain and suffering, and economic and non-economic damages that are ongoing and continuing in nature.

151. As a direct and proximate result of the NCAA's and Notre Dame's concealment and/or withholding facts and information, Plaintiff Steve Schmitz has suffered and will continue to suffer substantial injuries, harm, emotional distress, pain and suffering, and economic and non-economic damages that are ongoing and continuing in nature.

152. At the same time, Notre Dame and the NCAA gained the unfair advantage of having their football players, including Steve Schmitz, continue to play football for them, resulting in profits, prestige and pecuniary gains to Notre Dame and the NCAA at the expense of Steve Schmitz and his long-term health.

153. As a result of the NCAA's and Notre Dame's misconduct, including the concealment of facts known to them, which they had a duty to disclose to their football players, including Plaintiff Steve Schmitz, the NCAA and Notre Dame are liable to Plaintiff Steve Schmitz for the full measure of damages allowed under applicable law.

**COUNT IV- BREACH OF EXPRESS CONTRACT**
**(Plaintiff STEVE SCHMITZ vs. NCAA)**

154. Plaintiff Steve Schmitz incorporates by reference as if fully set forth herein paragraphs 1 through 153 as set forth above.

155. As a student-athlete at Defendant Notre Dame, an NCAA-governed institution, Plaintiff Steve Schmitz was required to enter into a contract with Defendant NCAA as a prerequisite to sports participation. The contract required Plaintiff Steve Schmitz to sign a form affirming that he has read the NCAA regulations and applicable NCAA Division manual, which expressly encompassed the NCAA Constitution, Operating Bylaws, and Administrative Bylaws, and further, that he agreed to abide by NCAA Division bylaws.

156. In exchange for Steve Schmitz's agreement, the NCAA promised to perform certain services and functions, including, inter alia:

(a) conducting intercollegiate athletics in a manner designed to protect and enhance the physical and educational well-being of student-athletes (NCAA Const., Art. 2, § 2.2);

(b) requiring that Notre Dame protect Steve Schmitz' health and provide a safe environment for all of its participating student-athletes, including Steve Schmitz (NCAA Const., Art. 2, § 2.2.3); and

(c) requiring that each member institution, including Notre Dame, establish and maintain an environment in which a student-athlete's activities are conducted as an integral part of the student-athlete's educational experience (NCAA Const., Art. 2, § 2.2).

157. By signing and agreeing to abide by NCAA regulations, and thereafter participating in NCAA sanctioned football program, Steve Schmitz fulfilled his obligations under the contract.

158. In addition, Steve Schmitz is a third party beneficiary of the contract between the NCAA and Notre Dame, and Notre Dame adopted the same duties to Steve Schmitz to

which the NCAA had agreed.

159. The NCAA breached its obligations under its contract with Steve Schmitz by failing to ensure a safe environment at Notre Dame football practices and games in which Steve Schmitz participated. The NCAA further breached its obligation by concealing and/or failing to properly educate and warn Steve Schmitz about the symptoms and long-term risks of concussions and concussion-related concussive and sub-concussive impacts.

160. Furthermore, the NCAA breached its contractual duty to Steve Schmitz by failing to offer mid and late life warnings and treatment to mitigate the latent brain injuries he sustained and would sustain.

161. The NCAA's breach of its contractual obligations caused Plaintiff Steve Schmitz to suffer physical injury and damages in the form of latent brain damage, emotional distress, loss of income and employment, and past, ongoing, and future medical expenses.

162. Plaintiff Steve Schmitz seeks actual damages for the NCAA's breach of contract, as well as interest, reasonable attorney's fees, expenses, and costs to the extent allowable.

163. Plaintiffs have not attached a copy of the contract as required by Ohio Civil Rule 10(D) because he has not been able to locate it. After moving a number of times and, more recently, losing his home, Plaintiff has not been able to locate all of his belongings. Plaintiffs believe Defendants NCAA and/or Notre Dame likely possess copies of the contract.

**COUNT V - BREACH OF IMPLIED CONTRACT**
**(Plaintiff STEVE SCHMITZ vs. NCAA)**

164. Plaintiff Steve Schmitz incorporates by reference as if fully set forth herein paragraphs 1 through 163 as set forth above.

165. Under an implied contract, all student-athletes agree to be bound by NCAA rules and regulations in exchange for their participation in NCAA-controlled athletic programs.

166. As a condition of the implied contract, the NCAA agreed to abide by the promises set forth in its own Constitution and Bylaws, as described above.

167. Plaintiff Steve Schmitz showed his acceptance of the contract and performed under the contract by participating in NCAA-controlled athletic programs at Notre Dame in accordance with NCAA rules and regulations.

168. Defendant NCAA breached the contract by failing to ensure that Steve Schmitz was provided with a safe environment in which to participate in Notre Dame football.

169. Defendant NCAA further breached the contract by concealing and/or failing to properly educate and warn Steve Schmitz and other players about the symptoms and long-term risks of concussions and sub-concussive events-. Furthermore, the NCAA breached its duty to Steve Schmitz by failing to offer mid and late life warnings and treatment to mitigate his injuries.

170. Defendant's breach of the contract caused Steve Schmitz to suffer long-term physical injury and damages in the form of latent brain damage, loss of employment, loss of income, past, ongoing, and future medical expenses, other out of pocket expenses, lost time, lost future earnings, and other damages. Plaintiff Steve Schmitz will likely incur future damages caused by Defendant's breach.

171. Plaintiff Steve Schmitz seeks damages for Defendant's breach of contract, as well as interest, reasonable attorneys' fees, expenses, and costs to the extent allowable.

## COUNT VI- BREACH OF EXPRESS CONTRACT
## (Plaintiff STEVE SCHMITZ vs. NOTRE DAME)

172. Plaintiff Steve Schmitz incorporates by reference as if fully set forth herein paragraphs 1 through 171 as set forth above.

173. As a Cleveland, Ohio high school student recruited by Notre Dame, Plaintiff Steve Schmitz entered into a written agreement in which he committed to play football at Notre Dame, to attend Notre Dame as a student, and to comply with all codes of conduct and obligations as both a football player and student at Notre Dame.

174. The contract required that Notre Dame fulfill its obligations to Steve Schmitz, and those obligations included that:

(a) Notre Dame conduct the Notre Dame football program in a manner designed to protect and enhance the physical and educational well-being of Steve Schmitz and other student football players; and

(b) require that the Notre Dame football program furnish a safe environment for Steve Schmitz and all of the program's participants.

175. Steve Schmitz fulfilled his obligations under the contract.

176. In addition, Steve Schmitz is a third party beneficiary of the contract between the NCAA and Notre Dame, and Notre Dame adopted the NCAA's duties to Steve Schmitz set forth above.

177. Notre Dame breached its obligations under the contract by failing to ensure a safe environment at Notre Dame football in which Steve Schmitz participated.

178. Notre Dame further breached its obligation by concealing and/or failing to properly educate and warn Steve Schmitz about the fact that he was being exposed to long-term health risks that would destroy his life..

179. Notre Dame further breached its obligation by supporting, sponsoring, and encouraging a Notre Dame football program that demanded and urged Steve Schmitz and other student football players to inflict concussive and sub-concussive impacts on themselves and others in practices and games.

180. Furthermore, Notre Dame breached its contractual duty to Steve Schmitz by failing to offer mid and late life warnings to help him become aware of and mitigate his latent brain injuries.

181. Notre Dame's breach of its contractual obligation caused Plaintiff Steve Schmitz to suffer physical injury and damages in the form of latent brain damage, emotional distress, loss of income and employment, and past, ongoing, and future medical expenses.

182. Steve Schmitz seeks actual damages for Notre Dame's breach of contract, as well as interest, reasonable attorney's fees, expenses, and costs to the extent allowable.

183. Plaintiff has not attached a copy of the contract as required by Ohio Civil Rule 10(D) because he has not been able to locate it. After moving a number of times and, more recently, losing his home, Plaintiff has not been able to locate all of his belongings. Plaintiffs believe, however, that Defendant Notre Dame likely possesses a copy of the contract.

**COUNT VII**
**LOSS OF CONSORTIUM**
**(Plaintiff YVETTE SCHMITZ Against the NCAA AND NOTRE DAME)**

184. Plaintiff Yvette Schmitz incorporates by reference as if fully set forth herein paragraphs 1 through 183 above.

185. As a result of their misconduct, the Defendants are liable to Plaintiff Yvette Schmitz.

186. As a direct and proximate result of the intentional misconduct, carelessness, negligence, and recklessness, Plaintiff Steve Schmitz has sustained the injuries as set forth above and will continue to incur injuries and damages as his life progresses.

187. As a result, Plaintiff Yvette Schmitz has been damaged as follows:

a. She has been and will continue to be deprived of the services, society and companionship of her husband;

b. She has been and will continue to be required to spend money for medical care and household care for the treatment of her husband; and

c. She has been and will continue to be deprived of the earnings of her husband, but for the injuries he has sustained as a result of the conduct of the Defendants.

188. As a result of Notre Dame's and the NCAA's misconduct and the injuries sustained by Plaintiff Steve Schmitz, Plaintiff Yvette Schmitz is entitled to damages, as alleged herein and allowed by law.

## PRAYER FOR RELIEF

WHEREFORE, the Plaintiffs Steve and Yvette Schmitz pray for judgment as follows:

A. With respect to all Counts, an award of compensatory damages against the NCAA and Notre Dame in excess of $25,000, exclusive of costs.

B. With respect to all Counts, an award to Plaintiffs Steve and Yvette Schmitz of punitive damages;

C. With respect to all Counts, an award to Plaintiffs Steve and Yvette Schmitz of such other and further relief as may be appropriate; and

D. With respect to all Counts an award to Plaintiffs Steve and Yvette Schmitz of prejudgment interest, costs and attorney's fees.

**JURY DEMAND**

Pursuant to Rule 38 (B) of the Ohio Rules of Civil Procedure, plaintiffs hereby demand a trial by jury in this action.

**Respectfully Submitted,**

**BARKAN MEIZLISH HANDELMAN GOODIN DEROSE WENTZ, LLP**

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**ATTORNEYS FOR PLAINTIFFS STEVEN AND YVETTE SCHMITZ**

# EXHIBIT "D"

**DECEDENT**

| 1. Social Security Number | 2. Age (Years) | Months | Days | Hours | Minutes | 3. Date of Birth | 4. Birthplace |
|---|---|---|---|---|---|---|---|
| 272-56-7761 | 59 | | | | | December 18, 1955 | CLEVELAND, OHIO |

| 5a. Residence State | 5b. County | 5c. City or Town | | |
|---|---|---|---|---|
| OHIO | CUYAHOGA | WESTLAKE | | |
| 5d. Street and Number | | 5e. Apt. No. | 5f. Zipcode | 5g. Inside City Limits? |
| 27517 Remington Circle | | | 44145 | Yes |

| 9. Ever in US Armed Forces? | 10. Marital Status at Time of Death | 11. Surviving Spouse's Name (if wife, give name prior to last marriage) |
|---|---|---|
| No | Married | YVETTE BAILEY |

| 12. Decedent's Education | 13. Decedent of Hispanic Origin | 14. Decedent's Race |
|---|---|---|
| BACHELORS DEGREE (E.G., BA, AB, BS) | No | White |

| 15. Father's Name | 16. Mother's Name (prior to first marriage) |
|---|---|
| GEORGE SCHMITZ | KATHRINE HRONIS |

| 17a. Informant's Name | 17b. Relationship to Decedent | 17c. Mailing Address (Street and Number, City, State, Zip Code) |
|---|---|---|
| YVETTE SCHMITZ | Wife | 27517 Remington Circle<br>WESTLAKE, OHIO 44145 |

| 18a. Place of Death | 18b. Facility Name (If not Institution, give street & number) | 18c. City or Town, State and Zip Code | 18d. County of Death |
|---|---|---|---|
| Decedent's Home | 27517 Remington Circle | WESTLAKE, OH 44145 | CUYAHOGA |

**DISPOSITION**

| 19. Signature of Funeral Service Licensee or Other Agent | 20. License Number (If licensee) | 21. Name and Complete Address of Funeral Facility |
|---|---|---|
| | 009240 | ZEIS-MCGREEVEY FUNERAL HOME INC<br>16105 DETROIT AVE<br>LAKEWOOD, OH 44107 |

| 22a. Method of Disposition | 22b. Date of Disposition | |
|---|---|---|
| Cremation | 2-17-2015 | |
| 22c. Place of Disposition (Name of Cemetery, Crematory, or other place) | 22d. Location (City/Town and State) | |
| Westshore Cremation | WESTLAKE, OH | |

**REGISTRAR**

| 23. Registrar's Signature | 24. Date Filed |
|---|---|
| Morry A. Blech | FEB 17 2015 |
| 25a. Name of Person Issuing Burial Permit | 25b. District No. | 25c. Date Burial Permit Issued |
| BLECH, MORRY | 1800 | FEB 17 2015 |

**CERTIFIER**

26. Certifier (Check only one)

☒ Certifying Physician — To the best of my knowledge, death occurred at the time, date, and place; and due to the cause(s) and manner stated.

☐ Coroner — On the basis of examination and/or investigation, in my opinion, death occurred at the time, date, and place; and due to the cause(s) and manner stated.

| 26b. Time of Death | 26c. Date Pronounced Dead (Mo/Day/Year) | 26d. Was case referred to coroner? |
|---|---|---|
| 4:45 PM | 2/13/2015 | No |

| 26e. Signature and Title of Certifier | | 26f. License Number | 26g. Date Signed |
|---|---|---|---|
| | MD | 35.124060 | 2/16/2015 |

27. Name (Last, First, Middle) and Address of Person who Completed Cause of Death
HOEKSEMA, LAURA J, 9500 EUCLID AVENUE CLEVELAND, OH 44195

**CAUSE OF DEATH**

28. Part I. Enter the disease, injuries, or complications that caused the death. Do not enter the mode of dying, such as cardiac or respiratory arrest, shock, or heart failure. List only one cause on each line. Type or print in permanent blue or black ink.

| | | Approximate Interval Between Onset and Death |
|---|---|---|
| Immediate Cause (Final disease or condition resulting in death) | a. Alzheimer's dementia | years |
| Sequentially list conditions, if any, leading to immediate cause. | b. Due to (or as Consequence of) | |
| | c. Due to (or as Consequence of) | |
| Enter Underlying Cause (Disease or injury that initiated events resulting in death) | d. Due to (or as Consequence of) | |

Part II. Other significant conditions contributing to death but not resulting in the underlying cause given in Part I: Coronary artery disease, cerebrovascular disease

| 29a. Was An Autopsy Performed? | 29b. Were Autopsy Findings Available Prior To Completion Of Cause of Death? |
|---|---|
| ☐ Yes ☒ No | ☐ Yes ☐ No ☐ Not Applicable |

| 30. Did Tobacco Use Contribute to Death? | 31. If Female, Pregnancy Status | 32. Manner of Death | |
|---|---|---|---|
| ☐ Yes ☐ Unknown | ☐ Not pregnant within past year | ☒ Natural | ☐ Homicide |
| ☒ No ☐ Probably | ☐ Pregnant at time of death | ☐ Accident | ☐ Pending Investigation |
| | ☐ Not pregnant, but pregnant within 42 days of death | ☐ Suicide | ☐ Could not be determined |
| | ☐ Not pregnant, but pregnant 43 days to 1 year before death | | |
| | ☐ Unknown if pregnant within the past year | | |

| 33a. Date of Injury (Mo/Day/Year) | 33b. Time of Injury | 33c. Place of Injury (e.g., Decedent's home, construction site, restaurant, wooded area) | 33d. Injury at Work? |
|---|---|---|---|
| | | | ☐ Yes ☐ No |

33e. Location of Injury (Street and Number or Rural Route Number, City or Town, State)

| 33f. Describe How Injury Occurred: | 33g. If Transportation Injury, Specify: |
|---|---|
| | ☐ Driver/Operator ☐ Pedestrian ☐ Passenger ☐ Other: |

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STEVEN T SCHMITZ

| | |
|---|---|
| Place of Death: Decedent's Home | Date of Death: February 13, 2015 |
| 23. Registrar's Signature: Mary A. Bleck | 24. Date Filed: FEB 18 2015 |

25a. Certifier (Check only one)

☒ Certifying Physician
To the best of my knowledge, death occurred at the time, date, and place, and due to the cause(s) and manner stated.

☐ Coroner
On the basis of examination and/or investigation, in my opinion, death occurred at the time, date, and place, and due to the cause(s) and manner stated.

| 25b. Time of Death | 25c. Date Pronounced Dead (Mo/Day/Year) | 25d. Was Case referred to Coroner? |
|---|---|---|
| 4:45 PM | 2/13/2015 | |

| 25e. Signature and Title of Certifier | 25f. License number | 25g. Date Signed |
|---|---|---|
| MD | 35.124060 | 2/17/2015 |

27. Name (First, Middle, Last) and Address of Person who Completed Cause of Death
HOCKSEMA, LAURA J 9500 Euclid Avenue Cleveland, OH 44195

28. Part I. Enter the disease, injuries, or complications that caused the death. Do not enter the mode of dying, such as cardiac or respiratory arrest, shock, or heart failure. Use only one cause on each line. Type or print in permanent black ink.

| | | Approximate Interval Between Onset and Death |
|---|---|---|
| Immediate Cause (Final disease or condition resulting in death) | a. Chronic traumatic encephalopathy | years |
| Sequentially list conditions, if any, leading to the immediate cause. | b. Due to (or as Consequence of) | |
| Enter Underlying Cause Last (Disease or injury that initiated events resulting in death) | c. Due to (or as Consequence of) | |
| | d. Due to (or as Consequence of) | |

Part II. Other Significant Conditions contributing to death but not resulting in the underlying cause given in Part I.

29a. Was an Autopsy Performed? ☐ Yes ☒ No

29b. Were Autopsy Findings Available Prior to completion of Cause of Death? ☐ Yes ☐ No ☐ Not Applicable

30. Did Tobacco Use Contribute to Death?
☐ Yes ☐ Unknown
☒ No ☐ Probably

31. If Female, Pregnancy Status
☐ Not pregnant within past year
☐ Pregnant at time of death
☐ Not pregnant, but pregnant within 42 days of death
☐ Not pregnant, but pregnant 43 days to 1 year before death
☐ Unknown if pregnant within the past year

32. Manner of Death
☒ Natural ☐ Homicide
☐ Accident ☐ Pending Investigation
☐ Suicide ☐ Could not be determined

| 33a. Date of Injury (Mo/Day/Year) | 33b. Time of Injury | 33c. Place of Injury (e.g., Decedent's home, construction site, restaurant, wooded area) | 33d. Injury at Work? ☐ Yes ☐ No |
|---|---|---|---|
| | | | |

33e. Location of Injury (Street and Number or Rural Route Number, City or Town, State)

33f. Describe How Injury Occurred:

33g. If Transportation Injury, Specify:
☐ Driver/Operator ☐ Pedestrian ☐ Passenger
☐ Other:

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Rev. 01/07

THIS SUPPLEMENTARY CERTIFICATE IS TO BE COMPLETED BY THE ATTENDING PHYSICIAN OR CORONER AND FILED WITH LOCAL REGISTRAR OF VITAL STATISTICS
Required by section 3705.27 of the Ohio Revised Code

928339

2015015778

# EXHIBIT "E"

**IN THE SUPREME COURT OF OHIO**

| | |
|---|---|
| National Collegiate Athletic Association, et al.,<br><br>Defendants-Appellants,<br><br>v.<br><br>Steven Schmitz, et al.,<br><br>Plaintiffs-Appellees. | **Case No.** _____<br><br>Appeal from the Cuyahoga County Court of Appeals, Eighth Appellate District<br><br>Court of Appeals Case No. CA-15-103525 |

# MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANTS NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, AND UNIVERSITY OF NOTRE DAME DU LAC


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## EXPLANATION OF WHY THIS CASE IS OF PUBLIC OR GREAT GENERAL INTEREST

Suppose an individual experiences an injury, knowing its cause. Can he nonetheless wait 40 years to ascertain the full severity of his injury before bringing suit? The trial court sensibly answered this question no, and dismissed Plaintiffs' action. But the Eighth District Court of Appeals reversed, reviving Plaintiffs' stale claims. This limitations question, which arises in the context of the burgeoning class of athletics-related lawsuits, deserves the Court's attention, for today's case and those to follow.

* * *

Steven Schmitz played football for Notre Dame in the mid-1970s. Plaintiffs (Schmitz's estate, and his wife Yvette) allege that Notre Dame "conducted a football program that proactively rewarded ... Schmitz for inflicting head injuries on himself and others and compelled him to ignore concussion symptoms." Complt. ¶ 105. They allege that Notre Dame instructed Schmitz to use his "helmeted head against opposing players and teammates," both during games and at practice, and also "required [Schmitz] to continue to play in games and practices after [he] had sustained concussion symptoms." Complt. ¶¶ 61–62. These "repetitive head impacts," Schmitz says, resulted in him suffering "concussive and sub-concussive impacts," Complt. ¶ 3, "concussion symptoms," and "being substantially disoriented as to time and place," Complt. ¶ 64.

In the decades that followed Schmitz's playing days, the symptoms allegedly

caused by his head injuries worsened. Plaintiffs allege that, over time, Schmitz developed "severe memory loss, cognitive decline, Alzheimer's, traumatic encephalopathy, and dementia," all allegedly "caused, aggravated, and/or magnified by the repetitive concussive blows and/or sub-concussive blows to the head" suffered while playing football for Notre Dame. Complt. ¶ 19. Plaintiffs allege that Schmitz's injury developed into Chronic Traumatic Encephalopathy, or "CTE," with which he was allegedly diagnosed in 2012. Complt. ¶ 20. Schmitz and his wife Yvette filed suit against Notre Dame and the NCAA in 2014—40 years after Schmitz's enrollment at Notre Dame—seeking tort damages for cognitive impairments Schmitz allegedly suffered later in life.

Despite Schmitz's awareness of concussive effects in the 1970s, and despite the unfortunate worsening of his condition over time, Plaintiffs allege that Schmitz was not required to bring his claim at any point before 2012. It was only then, they allege, that Schmitz had "discovered" the full extent of his injuries, and thus only then that the limitations clock began to tick.

While purporting to apply the settled understanding of the "discovery rule" exception to the accrual of a cause of action, the Eighth District dramatically expanded the rule's scope, writing into Ohio law a new avenue for evading otherwise-controlling statutes of limitations. Indeed, under the Eighth District's interpretation of the discovery rule, Ohio plaintiffs can now toll their claims for years—even decades—

simply by characterizing the effects of prior injuries as "new" injuries. If left to stand, the Eighth District's rule thrusts dramatic uncertainty into an otherwise orderly and predictable statutes-of-limitations regime. Numerous Ohio industries—from education to health care to business and beyond—would face the threat of a revival of otherwise abandoned, time-barred claims, all on the theory that a plaintiff has suffered a "new" injury entitling him to his (belated) day in court.

Today's case is the perfect vehicle for deciding whether Ohio's discovery rule has expanded as far the Eighth District's holding suggests. Traditionally, statutes of limitations in Ohio begin to run once a party becomes aware of his injury and its cause, even if he is not yet aware of the injury's full extent. *See Doe v. First United Methodist Church*, 68 Ohio St.3d 531, 538–39, 1994-Ohio-531, 629 N.E.2d 402 (Ohio 1994), *superseded by statute on other grounds*; *Jones v. Hughey*, 153 Ohio App.3d 314, 2003-Ohio-3184, 794 N.E.2d 79, ¶ 28 (10th Dist.). If Schmitz's claims accrued at the time he suffered his initial head injuries, or at any time in the ensuing decades when his injury worsened, then Plaintiffs' 2014 complaint was untimely—the two-year statute of limitations applicable to this case would have run long ago. The question here is whether that statute of limitations was tolled until the alleged diagnosis of the ultimate culmination of Schmitz's head injuries suffered at Notre Dame.

*The discovery rule does not permit tolling statutes of limitations for as long as it takes the plaintiff to discover the full effects of injuries he already knows about.*

There are at least four reasons the Court should entertain this appeal.

**1.** First, the decision below broadens and confuses the discovery rule's application, despite important policy concerns that require a narrow, clear rule.

Four policy rationales undergird statutes of limitations: "(1) ensuring fairness to the defendant, (2) encouraging prompt prosecution of causes of action, (3) suppressing stale and fraudulent claims, and (4) avoiding the inconveniences engendered by delay—specifically, the difficulties of proof present in older cases." *Flagstar Bank, F.S.B. v. Airline Union's Mortg. Co.*, 128 Ohio St.3d 529, 2011-Ohio-1961, 947 N.E.2d 672, ¶ 7(quoting *Pratte v. Stewart*, 125 Ohio St.3d 473, 2010-Ohio-1860, 929 N.E.2d 415, ¶ 42).

To honor these objectives, exceptions to otherwise-controlling statutes of limitations are narrowly understood. The so-called "discovery rule," for example, is a limited exception to the general rule that "a cause of action exists from the time the wrongful act is committed." *Id.* at ¶ 13. "Under the discovery rule, the statute of limitations begins to run when the plaintiff discovers or, through the exercise of reasonable diligence, should have discovered a possible cause of action." *Doe v. Archdiocese of Cincinnati*, 109 Ohio St.3d 491, 2006-Ohio-2625, 849 N.E.2d 268, ¶ 21. This exception promotes "fairness to both sides" by giving plaintiffs "a reasonable time to file suit" from the moment they learn of their injury and its cause. *Norgard v. Brush Wellman, Inc.*, 95 Ohio St.3d 165, 2002-Ohio-2007, 766 N.E.2d 977, ¶ 19. It also comports with the other policy rationales justifying a limitation period for causes of action: a plaintiff who is not aware of an injury cannot litigate it, and so beginning the statute of

limitations at the point of discovery is consistent with encouraging "prompt prosecution of causes of action," and "avoiding the inconveniences engendered by delay." *Flagstar Bank* at ¶ 7 (quoting *Pratte* at ¶ 42).

But were the discovery rule understood to permit the tolling of statutes of limitations until plaintiffs learn the full severity of their injuries, this exception would swallow the rule, since the exception would have an unpredictable nature. Doing so would also undermine many goals of our legal system. It would undercut fairness and finality concerns: a statute of limitations that restarted with each worsening of a previous injury would prevent individuals and organizations from reliably predicting, in deciding how to manage their affairs, the lawsuits to which they might be subject. And it would jeopardize the reliability of tort proceedings. After all, the longer an injured plaintiff waits to sue, the more difficult it is to adjudicate his suit reliably, given "the inconveniences engendered by delay." *Id.* at ¶ 7 (quoting *Pratte* at ¶ 42).

In light of all this, it is no surprise that the discovery rule applies to latent-injury cases, but *not* to cases involving latent effects of known injuries. *See Doe*, 68 Ohio St.3d at 538–39, 629 N.E.2d 402; *Jones*, 153 Ohio App.3d 314, 2003-Ohio-3184, 794 N.E.2d 79, at ¶ 28. The Eighth Appellate District purported to recognize this principle. A.17. (Citations to the Appendix appear as "A.," followed by the page number.) But it held that Schmitz's later-experienced cognitive impairments were a *new* injury, as opposed to the newly experienced effects of old injuries. A.14; A.17.

It is possible to reach that conclusion only by ignoring Plaintiffs' complaint. Plaintiffs alleged that Schmitz knew he had been injured, as he "experienced concussion symptoms, including but not limited to being substantially disoriented as to time and place." Complt. ¶ 64. He allegedly knew those injuries were caused by hits to the head while playing football for Notre Dame, in the manner Notre Dame instructed. (Specifically, Plaintiffs accuse Notre Dame of instructing its players to "inflict on each other and opponents helmet to helmet hits of all kinds." Complt. ¶ 62.) They allege that Schmitz knew those injuries went untreated—that the NCAA and Notre Dame did nothing to monitor, protect against, or treat these injuries. Complt. ¶¶ 62, 63, 65–67. And they allege that the effects of Schmitz's injuries increased in severity over time. Complt. ¶ 19.

All of this amounts to a recognition that the cognitive impairments were the more-serious results of Schmitz's earlier alleged injuries. Yet the Eighth District, contrary to the complaint's allegations, characterized these impairments as new injuries—injuries that Schmitz claims he did not know about until 2012. In this way, the Eighth District managed to circumvent the relevant statute of limitations. A.14, A.17.

**2.** This case is of public interest for a second reason: it is at best in tension, and at worst irreconcilable, with a case from the Fifth Appellate District.

*Pingue v. Pingue*, 5th Dist. Delaware No. 03-CA-E-12070, 2004-Ohio-4173, held that the discovery rule *does not* toll statutes of limitations in cases involving the newly

discovered neurological and psychological effects of previously known injuries. That case involved a plaintiff who alleged that his father physically abused him between 1962 and 1990. *Id.* at ¶ 10. He sued in 2003, less than one year after "his neurologist informed him he had suffered an irreversible brain injury" and "post-traumatic stress disorder," and that he was "at greater risk of contracting Parkinson's disease and Alzheimer's disease as a result of his brain injury." *Id.*

The trial court dismissed the claims as untimely, and the Fifth District affirmed. The plaintiff argued that his suit was timely, because he did not learn about the injuries until 2003. Rejecting that argument, the Fifth District reasoned that the plaintiff knew that his father assaulted him in 1990, and thus knew of both his injuries and their cause. It made no difference that it took much longer for the plaintiff to learn "the extent of his injuries." *Id.* at ¶ 19. *Pingue* thus stands for the proposition that the discovery rule applies only where the injury or its cause are unknown; it is *inapplicable* where the injury and its cause are known, but the injury's severity is not. *Id.* at ¶¶ 20–24.

In contrast to *Pingue*, the Eighth District held below that Plaintiffs' allegations of newly discovered neurological effects of earlier known injuries *are* new injuries to which the discovery rule applies. Again, Schmitz alleged that he suffered concussion-like symptoms while playing for Notre Dame, and he alleged that the same injuries that produced those symptoms also produced his later cognitive impairments. These facts mirror those in *Pingue*: in both cases, the plaintiff knew he had been injured, knew the

cause of his injury, and only later came to understand the full effect of those injuries. Plaintiffs' case thus would have come out differently in the Fifth District.

**3.** Additionally, the case is of great public and general interest because it touches on a topic of national concern: sports-related head injuries. Suits based on such injuries are being filed around the country, with increasing frequency. *See, e.g., Breland v. Arena Football One, LLC.*, E.D. La. No. CV 15-2258, 2016 WL 6821953, at *1 (Nov. 18, 2016); *McCullough v. World Wrestling Entm't, Inc.*, D. Conn. No. 3:15-CV-001074 (VLB), 2016 WL 6662673, at *1 (Nov. 10, 2016); *Newman v. Highland Sch. Dist. No. 203*, 381 P.3d 1188, 1189 (Wash. 2016); *In re: Nat'l Collegiate Athletic Ass'n Student-Athlete Concussion Injury Litig.*, N.D. Ill. No. 13 C 9116, 2016 WL 3854603, at *1 (July 15, 2016); *In re Nat'l Football League Players Concussion Injury Litig.*, 821 F.3d 410, 422 (3d Cir. 2016), as amended (May 2, 2016), *cert. denied*, 2016 WL 458581 (Dec. 12, 2016), and *cert. denied*, 2016 WL 7182246 (Dec. 12, 2016). Ohio courts will not be excepted from this trend, as there are millions of current and former amateur athletes in the Buckeye State.

Courts presented with such cases will need better guidance. "By its very nature, the discovery rule ... must be specially tailored to the particular context in which it is to be applied." *Flagstar*, 128 Ohio St.3d 529, 2011-Ohio-1961, 947 N.E.2d 672, at ¶ 15 (quoting *Browning v. Burt*, 66 Ohio St.3d 544, 599, 613 N.E.2d 993 (1993)). This case presents the Court with the perfect vehicle for clarifying the rule's application to the increasingly important head-injury context.

**4.** This case is of great public interest for one final reason: the Eighth District's decision allows parties to avoid the two-year statute of limitations applicable to personal-injury claims, R.C 2305.10(A), simply by labeling personal-injury claims as "fraud" claims. In this case, every one of Schmitz's claims seeks recovery for injuries that Plaintiffs say resulted from his football career. The Eighth District nonetheless held that the claims that Plaintiffs labeled as "fraudulent concealment" and "constructive fraud" claims were subject to the four-year statute of limitations in Ohio Revised Code 2305.09. *See* A.21–22. This flatly contradicts, *Andrianos v. Community Traction Co.*, 155 Ohio. St. 47, 97 N.E.2d 549 (1951), paragraph two of the syllabus, which held that a statute of limitations applicable to personal-injury suits "governs all actions the real purpose of which is to recover damages for injury to the person and losses incident thereto"—*without regard to* "the form in which the action is brought."

The Eighth District's decision undercuts the legislature's choice to subject personal-injury claims to a two-year statute of limitations; parties can circumvent R.C. 2305.10(A) with not-even-creative labeling. And it confuses Ohio law by contradicting decisions from other Ohio courts. *See, e.g., Gilliam v. Mid-Am. Sec. Serv., Inc.*, 11th Dist. Trumbull No. 94-T-5079, 1994 WL 738504, *2 (Dec. 23, 1994); *Viock v. Stowe-Woodward Co.*, 13 Ohio App.3d 7, 11, 467 N.E.2d 1378 (6th Dist. 1983).

## STATEMENT OF THE CASE AND FACTS

### I. Factual Background

Steven Schmitz played football for Notre Dame between 1974 and 1978. He and his wife filed this suit, alleging that Schmitz "experienced concussion symptoms" on "many occasions" during his career, and that these symptoms included "being substantially disoriented as to time and place." Complt. ¶ 64. Following his playing days, Schmitz was additionally diagnosed with "severe memory loss, cognitive decline, Alzheimer's, ... and dementia," *id.* at 19—conditions that were allegedly "caused, aggravated, and/or magnified by the repetitive concussive blows and/or sub-concussive blows to the head [Schmitz] suffered" at Notre Dame. Plaintiffs alleged that his cognitive abilities continued to decrease over his lifespan until, in December 2012, a doctor diagnosed him with CTE. *Id.* ¶ 20.

### II. Procedural History

In October 2014, Schmitz (now deceased) and his wife Yvette sued Notre Dame and the NCAA, seeking damages for his cognitive impairment. Notre Dame and the NCAA moved to dismiss, arguing that all of the tortious conduct in this case occurred by 1978, and that the relevant statute of limitations had thus expired when Plaintiffs filed suit in 2014. The trial court agreed, and dismissed the case.

The Eighth Appellate District reversed in relevant part. *See* A.35. It held that "the condition of which Schmitz complained" was "CTE," A.17, and that he did not

learn he had CTE until December 2012. The court concluded that this injury, though caused by hits sustained while playing football, was *distinct* from the head injuries Schmitz suffered while playing football. And because Plaintiffs allege that Schmitz did not learn of *this* injury until December 2012, the court held, Plaintiffs timely filed within the two-year statute of limitation applicable to their negligence claims, R.C. 2305.10(A), and the four-year statute of limitations that the Eighth District held applicable to Plaintiffs' constructive-fraud and fraudulent-concealment claims, R.C. 2305.09(C).

## ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

**Proposition Of Law No. 1:** A diagnosis for the long-term effects of an injury a plaintiff already knew about does not revive a time-barred claim.

Plaintiffs' complaint alleges that Schmitz experienced numerous head injuries in college. The complaint further alleges that those injuries gave rise to his current cognitive impairments—including CTE. Since Schmitz's participation in football at Notre Dame ended in 1978, the head injuries that allegedly resulted in CTE necessarily occurred before that year. Yet the Eighth District concluded that Plaintiffs, who filed their complaint in 2014, pleaded negligence and fraud claims that fell within the two- and four-year limitations periods of R.C. 2305.09, and 2305.10. Why? Because it ignored the allegations, and concluded without analysis that the impairments were in fact distinct injuries, rather than the most recent effects of the head injuries first experienced approximately 40 years ago and recognized as worsening in the ensuing decades. Because the complaint alleges that those impairments were not diagnosed

until December 2012, the Eighth District applied the discovery rule, concluding that Plaintiffs timely filed their complaint in October 2014. A.15; A.17.

That reasoning is specious. "The discovery rule provides that a cause of action does not arise until the plaintiff knows, or by the exercise of reasonable diligence should know, that he or she has been injured by the conduct of the defendant." *Flagstar Bank*, 128, Ohio St.3d 529, 2011-Ohio-1961, 947 N.E.2d 672, at ¶ 14. Here, Plaintiffs' own allegations are that Schmitz knew: (1) he suffered head injuries while playing football for Notre Dame, Complt. ¶¶ 43, 62, 64; (2) he suffered those injuries while playing in the manner that Notre Dame's coaches taught, Complt. ¶¶ 61–63; and (3) he was not treated for those injuries, Complt. ¶¶ 62, 63, 65–67. Thus, by 1978, when Schmitz's college career ended, he already knew of his head injuries and their causes. According to the Plaintiffs' complaint, he learned over time that these injuries worsened, and resulted in cognitive decline and dementia. The allegation that in 2012 he learned that those injuries had worsened even further cannot justify application of the discovery rule. The Eighth District erred in holding otherwise. *See Doe*, 68 Ohio St.3d at 538–39, 629 N.E.2d 402; *Jones*, 153 Ohio App.3d 314, 2003-Ohio-3184, 794 N.E.2d 79, at ¶ 28.

This case is distinguishable from *Liddell v. SCA Services of Ohio, Inc.*, 70 Ohio St.3d 6, 635 N.E.2d 1233 (Ohio 1994), on which the Eighth District relied. *See* A.16–17. There, a police officer inhaled toxic gas at the scene of a burning garbage truck. The exposure caused "a scratchy throat and a burning and watering of his eyes," and eventually led

to "frequent sinus infections." *Liddell*, at 7. But he did not sue for those injuries, and the relevant statute of limitations ran. *Id.* Years later, he was diagnosed with a cancerous growth in the "same nasal cavity," and shortly thereafter sued the company that owned the garbage truck. *Id.* The Court held that the suit was timely because the officer's cancer was a latent disease—one arising from the same incident as, yet distinct from, the earlier accident-related injuries. That distinguishes *Lidell* from this case, where Plaintiffs alleged that Schmitz's cognitive impairments were the result of the long-term worsening of the head injuries he experienced and was aware of in college, rather than distinct injuries.

It is no answer to say, as the Eighth District did, that Schmitz came to believe Defendants' actions were tortious only after his 2012 diagnosis. A.19. Even where the discovery rule applies, it is satisfied once the plaintiff has "actual knowledge not just that [he] has been injured but also that the injury was caused by the conduct of the defendant." *Flagstar*, at ¶ 14. And while the Court has held that "discovery of an injury alone is insufficient to start the statute of limitations running if ... there is no indication of wrongful conduct [by] the defendant," *Norgard*, 95 Ohio St.3d 165, 2002-Ohio-2007, 766 N.E.2d 977, at ¶ 10, it has never held that a plaintiff must understand that the wrongful conduct *is* in fact wrongful. The Eighth District's contrary rule leads to the absurd result that statutes of limitations begin to run only once a plaintiff studies tort law enough to recognize the potential for successful litigation. Here, the complaint

acknowledges that Schmitz knew he was being injured when playing football for Notre Dame in the manner he was told to play by his coaches. He also believed that neither Notre Dame nor the NCAA were monitoring, protecting against, or treating those injuries. He knew all of that in 1978. And in the ensuing decades, but long before 2014, he knew that his injury had worsened, putting him well past the point of being on notice of a possible cause of action.

On top of all this, Plaintiffs' claims would be untimely *even if* the discovery rule applied. That rule provides that statutes of limitations begin running once the plaintiff "by the exercise of reasonable diligence *should know*" that he has a claim. *Flagstar Bank*, 2011-Ohio-1961 at ¶ 14 (emphasis added). By the time Schmitz took the field at Notre Dame, much had already been written regarding the short- and long-term dangers of sports-related head injuries. And in the ensuing years and decades, even more information detailing a possible correlation between concussions and long-term cognitive disabilities and disease was in the public eye—including through studies and protocols funded and issued by the NCAA itself. Complt. ¶¶ 4–5, 69, 109. Thus, a reasonable person in Schmitz's position would have been alerted to the potential connection between his earlier injuries, the coaching he received at Notre Dame, and his later cognitive decline, long before this suit was brought in 2014. And that is true even if one accepts the allegations in Plaintiffs' complaint.

**Proposition Of Law No. 2:** Plaintiffs' fraudulent-concealment and constructive-fraud claims are subject to the R.C. 2305.10(A)'s two-year statute of limitations.

The Eighth District held that Plaintiffs' fraudulent-concealment and constructive-fraud claims were subject to the four-year statute of limitations in R.C. 2305.09(C). A.21–22. That is wrong. "[W]here a statute, specific in terms, limits the time within which any action for 'injuries to the person' or 'bodily injury' may be brought, such statute governs all actions the real purpose of which is to recover for an injury to the person, whether based upon contract or tort." *Andrianos*, 155 Ohio St. at 50, 97 N.E.2d 549. Section 2305.10(A) is one such statute: it expressly states that "an action for bodily injury ... shall be brought within two years after the cause of action accrues." R.C. 2305.10(A). Plaintiffs cannot avoid this by adding "fraud" to the name of their claims. Each of their claims seeks damages for bodily injuries that Schmitz suffered. In other words, Plaintiffs' "real purpose," *Andrianos*, at 50, was to obtain damages for bodily injuries, and R.C. 2305.10(A) therefore governs.

Which statute of limitations applies to Plaintiffs' fraud claims is significant. Even if the Eighth District's misapplication of the discovery rule stands, information may emerge showing that Schmitz knew of the alleged concealment between 2 and 4 years before he filed suit. If that is the case, then the fraud claims will be dismissed as untimely only if the Eighth District's misapplication of R.C. 2305.09(C) is reversed.

## CONCLUSION

The Court should accept jurisdiction and reverse the decision below.

Dated: January 20, 2017

Respectfully submitted,

/s Matthew A. Kairis

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## CERTIFICATE OF SERVICE

I hereby certify that a true copy of this Memorandum in Support of Jurisdiction was served upon the following by electronic mail this January 20, 2017.

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# EXHIBIT "F"

**IN THE SUPREME COURT OF OHIO**

| | | |
|---|---|---|
| National Collegiate Athletic Association, et al.<br><br>Defendants-Appellants,<br><br>v.<br><br>Estate of Steven T. Schmitz, et al.<br><br>Plaintiffs-Appellees. | : | Case No. 2017-0098<br><br>Appeal from the Cuyahoga Count Court of Appeals, Eighth Appellate District<br><br>Court of Appeals Case No.: CA-15-103525 |

# OPPOSITION OF PLAINTIFFS-APPELLEES TO MEMORANDA IN SUPPORT OF JURISDICTION FILED BY DEFENDANTS-APPELLANTS AND AMICUS


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## THIS EIGHTH APPELLATE DISTRICT PROPERLY APPLIED OHIO'S DISCOVERY RULE TO A LATENT DISEASE CASE

This is an obvious latent disease case. At age 22, Steve Schmitz did not know (and could not have known) that he would later develop traumatic encephalopathy—the signature latent disease of repetitive head impacts in football. The Defendants-Appellants repeatedly misstate and misconstrue the Amended Complaint (hereinafter "Complaint") as if it admits to such knowledge. It does not. It states the opposite. The Complaint explicitly states that Steve Schmitz never realized he ever sustained a concussion and never realized he had been exposed to the risk of one day developing latent brain disease, including Chronic Traumatic Encephalopathy ("CTE"). Complaint at ¶¶ 18, 22, 64-68, 129. This is exactly how the Eighth Appellate District read the Complaint,[1] which is the opposite of what the Defendants-Appellants argue here and have argued in every paper they have filed.

The Eighth Appellate District (hereinafter the "Panel") did not expand Ohio's discovery rule at all. Rather, it applied toxic exposure cases authored by this Court[2] and applied Ohio's well-established discovery rule to Plaintiffs' claims of a latent disease. The panel also referred to cases outside of Ohio, all of which addressed the same issue and held that a dismissal at the pleadings stage was error and unfounded. A12-14. On that basis, the Panel reversed the trial court's one-sentence dismissal order, which appears to have been based on the same mistaken argument Defendants-Appellants advance here. The Panel also noted that if the Defendants-Appellants' argument were true, and Schmitz had been forced to bring his claims within two

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[1] The Panel stated: "The thrust of the Complaint is not an injury for concussive and subconcussive impacts; instead, the complaint alleges an injury in the form of CTE and other neurological diseases that did not manifest until decades after Schmitz stopped playing football at Notre Dame." (A14).

[2] *See, e.g.*, A14, *citing Liddell v. SCA Servs.*, 70 Ohio St.3d 6, 635 N.E.2d 1233, 1994 Ohio LEXIS 1615, at *1 (1994).

years of finishing college football, when he knew nothing and had no symptoms, his damages would have been speculative (A17) (that is, non-existent, because he would not have manifested any diagnosable injury or latent disease until he was 57.) That is exactly why the discovery rule applies in a latent disease case such as this one.

What the Defendants-Appellants are seeking is a narrowing of the Ohio's discovery rule so that it won't include latent brain injury cases involving sports. In other words, the NCAA and Notre Dame want Ohio courts to eliminate these claims completely at the pleading stage and before discovery and a factual record exists that can be reviewed by a trial or appellate court. The Panel saw this for what it is and held (a) that there was nothing in the Complaint that showed Schmitz had notice of an injury or the latent disease prior to his diagnosis, and (b) that every case cited by the NCAA in opposition to the negligence claims were summary judgment cases, not dismissals at the pleadings stage. A21 and A26.

The Panel also distinguished this case from the case of criminal assault relied upon heavily by the Defendants-Appellants, *Pingue v. Pingue*, 5th Dist. Delaware No. 03-CA-E12070, 2004-Ohio-4173. The Panel noted that the critical difference in *Pingue* was that the victim of ongoing criminal assault knew the injurious harm as it happened over a 28 year period, knew the cause of the harm, and knew the perpetrator. A18-19. The Panel stated "[t]he link between the injurious conduct and the known perpetrator that was clearly present in *Pingue* does not exist in this case....the complaint does not reveal that Schmitz was aware of any wrongful conduct until decades after he finished playing football. Schmitz did not know at the time he was playing football that the defendants were allegedly negligent or allegedly concealing information from him. Nor did he know that he had suffered a latent injury caused by playing football." A19.

For all of those reasons, the Panel applied Ohio's discovery rule properly. The opinion is

not an expansion of the discovery rule at all. Rather, the Defendants-Appellants and Amicus here seek to narrow the discovery rule to avoid these claims before a factual record even exists.

## THE COURT SHOULD NOT ENTERTAIN THIS APPEAL

### 1. The Decision Below Does Not Confuse or Expand Ohio's Discovery Rule.

This is not—and never has been—a case of Steve Schmitz suing Defendants-Appellants in connection with an injury (or worsening of an injury) known to him while playing football at Notre Dame University. The Defendants-Appellants have argued that from the beginning, and they still argue it. The Panel below rejected that argument completely and held that it is not a fair reading of the Complaint.[3] Now, as they have in the past, Defendants-Appellants continue to misconstrue the Complaint, and they argue that Schmitz knew of an actual injury at least by age 22. The Complaint does not say that. Nothing in the Complaint supports that inference. Rather, the Complaint expressly states that Steve Schmitz never knew he had an injury of any kind and never knew he had been exposed to the risk of a latent brain disease until he was diagnosed by a neurologist in late 2012. A14; Complaint at ¶¶ 18, 22, 64-68, 129.[4]

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[3] The Eighth Appellate District found that the Complaint states that Schmitz never knew he had an injury and did not know the cause of the injury until the Cleveland Clinic Neurology Department diagnosed him with a latent brain disease caused by football in late 2012. A14.

[4] The Complaint is clear. It states that Steve Schmitz was exposed – like all other Notre Dame and NCAA football players – to the risk of developing long-term brain disease caused by concussive hits to the head in football. Complaint ¶¶ 127-128. It also states that at no time, either during college or in the decades after he played football, did Steve Schmitz ever know or realize he had been exposed to the risk of latent brain disease caused by concussive blows to the head during football. *Id.* at ¶¶ 22, 129. Neither Steve Schmitz nor the football leadership of Notre Dame ever recognized that Schmitz had sustained a head injury of any kind. *Id.* ¶ 68. Never did Notre Dame ever test or examine Steve Schmitz for concussion symptoms or advise or educate him about what a concussion was or what concussion symptoms were. *Id.* at ¶ 67. At no time were any symptoms that Steve Schmitz experienced recognized by him or Notre Dame as an injury that should be monitored, treated, or even acknowledged. *Id.* at ¶¶ 64-65. Instead, Steve Schmitz relied upon the guidance, expertise, and instruction of both Notre Dame and the NCAA regarding the serious and life-altering medical issue of concussive and sub-concussive

The Defendants-Appellants' argument also defies logic and the law of Ohio. Steve Schmitz affirmatively pleaded that he never knew he had sustained any injury or any risk of exposure to a latent brain disease. In light of those allegations, the Defendants-Appellants are not permitted under Ohio law to conjure up a contrary reading to support a self-serving argument. All inferences from the Complaint must be construed in the Plaintiffs' favor, not the Defendants, and the Panel below properly drew those inferences in reversing the trial court's dismissal of Plaintiffs' Complaint.

Further, the Panel also saw the case the same way this Court saw *Liddell v. SAC Services*, 70 Ohio St. 3d 6, 635 N.E.2d 1233, 1994 Ohio LEXIS 1615, at *1 (1994), a seminal decision by this Court that applied the discovery rule to a latent disease case. In *Liddell*, the plaintiff police officer was exposed to toxic fumes when he escorted a school bus full of children to safety through the toxic cloud caused by a leak from an overturned truck. He experienced extensive symptoms and was hospitalized. He returned to work, and filed a workers' compensation claim for his medical bills based on the inhalation of fumes. *Id.* at *2. Within nine months, Liddell sustained sinus infections. *Id.* at *2-3. Six years after the exposure, a surgeon removed a benign tumor from Liddell's sinus cavity that revealed cancer. Although Liddell was fully aware that he had been exposed to toxic fumes from the outset, he filed suit for negligence based on the latent disease of cancer, diagnosed six years later. The trial court granted a motion to dismiss based on the two year statute of limitations, and the Appellate Court affirmed. This Court reversed, and applied Ohio's discovery rule. The Court held that Liddell's cancer did not manifest itself until many years later, so Liddell could not have discovered the injury before the two-year statute of limitations had expired. *Id.* at *13.

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risk in football, *Id.* at ¶ 124, because NCAA and Notre Dame had superior knowledge regarding the effect of repetitive concussive events. *Id.* at ¶ 125.

This Court also observed that if Liddell had attempted to bring a cause of action for negligence before the manifestation of the cancer, any damages for cancer would have been too speculative and impossible to prove. Imposing such a formulation on the plaintiff would be inherently unfair. *Id.* at *13. This Court stated that

> the procedural dilemma confronting a plaintiff in cases where a long latency conflicts with a short statute of limitations provides the plaintiff with only an illusory opportunity to litigate his or her claim. Under these circumstances, to deny the plaintiff a genuine opportunity to pursue a cause of action against a defendant now is patently unfair.

*Id.*

The Panel below correctly applied the same reasoning to this case. Like the police officer in *Liddell*, prior to his diagnosis with traumatic encephalopathy, Steve Schmitz did not know that he had been exposed to the risk of a latent brain disease caused by football or that he would be diagnosed with that latent brain disease at age 57. *See* Complaint at ¶¶ 20-22 (stating that prior to December 31, 2012, when he was diagnosed with traumatic encephalopathy, "Steve Schmitz did not know and had no grounds to believe that he had suffered a latent injury caused by playing football"). Distinct from *Liddell*, Steve Schmitz did not even know he had sustained an injury at all. Thus, not until Steve Schmitz received the diagnosis from the Cleveland Clinic did he ever know that he had an injury from football, that he had a latent disease, and that he had a claim. At that point, the Panel ruled, the limitations period began to run on his claims.

2. **This Case is Not in Conflict with *Pingue v. Pingue*.**

The Panel below properly distinguished *Pingue* from this case for the obvious reason that *Pingue* involved a completely different set of facts. In that case, the plaintiff was fully aware over the course of 28 years that he had been the victim of repeated criminal assaults by a known perpetrator (his father), and that the assaults had caused ongoing bodily injury and harm. A18-

19. That is not true here. In fact, it is plain from Schmitz' pleading that he never thought he sustained an injury at all, never thought there was wrongful conduct, never thought the NCAA and Notre Dame were possible malefactors, and never thought at age 22 that he would develop latent brain disease (decades later) caused by football. *See* note 4, *supra*.

The arguments Defendants-Appellants advance are, again, based on their self-serving misreading of the Complaint. Defendants-Appellants argue that Schmitz knew of an injury when he was in college, yet that is not what the Complaint states. It says the opposite. *See* Complaint at ¶ 129 ("At no time prior to being diagnosed in December 2012 was Steve Schmitz aware that he had sustained a brain injury as a result of football."). Also, Defendants-Appellants are under the mistaken belief that that the latent brain disease Schmitz developed is merely a more expanded version of the allegedly known concussive and sub-concussive injuries (never identified and diagnosed) he must have suffered at Notre Dame. This argument is mistaken, first, because Schmitz never knew he had sustained any injury at all. It is also mistaken, because the argument raises a scientific issue not yet subject to discovery. Third, the argument is mistaken, because if Steve Schmitz never recognized he had an injury at all, he is completely different from the plaintiff in *Pingue* or the myriad of other criminal assault cases the Defendants-Appellants cited to the Panel.

Rather, Schmitz is like the plaintiff in *Liddell*, who was unaware of his cancer until six years after he had been exposed to toxic fumes. Like the plaintiff in *Liddell*, Schmitz is suing based on his diagnosis at Cleveland Clinic at age 57.[5] Unlike the plaintiff in *Pingue*, Schmitz

[5] It is no fault of Steve Schmitz that the latent brain disease from which he suffered took decades to manifest, and the Defendants-Appellants should not be allowed to benefit from the fact that the brain disease at issue took decades to develop.

never knew he had sustained any injury at all, whereas the plaintiff in *Pingue* knew of wrongful conduct and harm caused by a known perpetrator for 28 years before he sued.

As a result, there is no conflict with *Pingue* at all. Rather, the Defendants-Appellants attempt to manufacture a conflict by misstating the facts of this case and seeking to conflate them with those of *Pingue*.

### 3. This Panel's Opinion is Consistent with Ohio Law and Rulings by Courts in Other States, and This Case Does Not Raise an Issue of Great Public Interest.

The Defendants-Appellants assert that this Court should intervene and give guidance in this case because litigation over sports-related injuries is of national interest. This Court has already provided expert guidance in its existing opinions involving latent disease cases and how Ohio's discovery rule applies, depending on the facts and circumstances of each case. For example, in *Liddell* and many other cases, this Court has set forth precisely how the discovery rule of *O'Stricker v. Jim Walter Corporation*, 4 Ohio St.3d 84, 87, 447 N.E.2d 727 (1983) prevents the manifest injustice the Defendants-Appellants are seeking here.[6]

Moreover, the Panel below provided citations to cases outside of Ohio that addressed the same or similar arguments in the same context: a motion to dismiss a sports-related latent brain injury claim based on the statute of limitations. A12-14. Those courts (federal district courts in Minnesota and Connecticut) came to the same conclusion as the Panel below. They found that in a latent brain injury case when and how that injury became manifest and known were subjects of

[6] In *O'Stricker*, this Court stated that in some situations "application of the general [statute of limitations] rule 'would lead to the unconscionable result that the injured party's right to recovery can be barred by the statute of limitations before he is even aware of [the claim's] existence'"). Here, Defendant-Appellants want the claim brought by Steve Schmitz to be barred decades before he ever knew he had an injury, a latent disease, or a claim.

discovery, and the claim should not be subject to a motion to dismiss.[7] Thus, those courts applied their respective state discovery rules in the same way this Court applied Ohio's discovery rule in *Liddell* and the Panel below applied the reasoning in *Liddell* to *Schmitz*. There is nothing unusual or uncertain about those rulings and nothing unusual or uncertain about Ohio's jurisprudence on that subject.

Defendants-Appellants also cite a number of other decisions from other jurisdictions, which are both factually and legally distinguishable, seemingly only in support of their assertions that cases involving sports-related injuries are being filed with "increasing frequency" around the country and that Ohio "will not be excepted from this trend." Just because lawsuits involving sports-related head injuries may be increasing in number around the country does not mean that there is a public and great general interest in this Court's application of its well-established and long-standing discovery rule. Accordingly, there is no need for this Court to provide additional "guidance" beyond the existing jurisprudence. Nor is there any reason to create a new and different application of the discovery rule in the "head injury context" as requested by Defendants-Appellants.

In fact, the Defendants-Appellants probably don't want guidance at all. What they want is for this Court to upend decades of Ohio jurisprudence on the discovery rule involving latent disease cases and create a new rule that protects the Defendants-Appellants from the burgeoning

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[7] *See In re NHL Players Concussion Injury Litigation*, No. 14-2551, 2015 U.S. Dist. LEXIS 38755 (Mar. 25, 2015). In that case, the NHL, like the Defendants-Appellants here, filed a motion to dismiss and argued that the statutes of limitations periods began to run on the dates on which the plaintiffs' head injuries occurred. The NHL argued "that the fact that those injuries may have progressed into more complicated medical conditions does not re-start the limitations period." *Id.* at *13-14 (citation omitted). The District Court in Minnesota denied the NHL's motion and reasoned that how and when the alleged brain disease occurred and developed were matters that could not be determined from the face of the complaint and are proper subjects of discovery. *Id.* at *17-18.

latent brain disease cases involving football players. Plaintiffs-Appellees respectfully request that the Court reject that request.

4. **The Panel's Ruling that the Four-Year Statute of Limitations for Fraud Claims Applies in this Case Does Not Raise an Issue of Great Public Interest.**

The Panel below ruled that Steve Schmitz' independent claims for constructive fraud and fraudulent concealment were separate and distinct from those alleging personal injury. It therefore concluded that those independent claims were governed by Ohio's four year statute of limitations for fraud claims, not the two year statute for personal injury claims. A22. The Panel recognized that this Court had made an analogous ruling in the *Gaines v. Preterm-Cleveland, Inc.*, 33 Ohio St. 3d 54, 56, 514 N.E.2d709 (1987) (fraud claim separate and distinct from medical malpractice claim is subject to the limitations period for fraud, not medical malpractice). A22. The Panel was correct, and Plaintiffs-Appellants respectfully request that the Court reject the Defendants-Appellants' argument as not worthy of great public interest or this Court.

Significantly, the Panel also recognized that the proper application of the discovery rule to all of the claims, negligence and fraud alike, established that the claims were not barred by any of the limitations periods, whether the period is two years or four. That is the Panel's fundamental ruling – under the discovery rule, Steve Schmitz did not discover and make a claim for his latent brain disease until well-within the two year statute of limitations for negligence claims. For that reason, even if the Court were to disagree with the Panel's opinion on which statute of limitations applies to the fraud claims, it does not matter. Under either limitation period, the claims were timely.

For all of those reasons, the Defendant-Appellants' argument that this issue is so momentous as to be one of great public interest is a red-herring. Whether or not the Court disagrees with the Panel's statements on the statute of limitations for the fraud claims, Steve

Schmitz brought them timely, and dismissal at this stage of proceedings was error. The trial court was properly reversed.

**5. The Ohio Association of Civil Trial Attorneys Also Has Not Shown That This Case is One of Public and Great General Interest.**

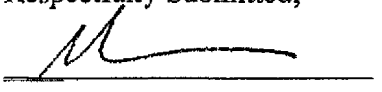
In its Amicus Brief, the Ohio Association of Civil Trial Attorneys ("OACTA") reiterated many of the same points made by Defendants-Appellants in their brief, without adding anything weighing in favor of this Court reviewing the instant appeal. Nevertheless, there is one statement requiring a response from Plaintiffs-Appellants. Specifically, although OACTA expressly states that it "does not take a position on the exact date on which Schmitz's statute of limitations began to run," OACTA nevertheless affirmatively asserts that "Schmitz knew in the 1970s that he had sustained brain damage and, with reasonable diligence, should have known before 2012 that college football caused this damage." OACTA fails to cite any part of the Complaint (or any other document of record) to support this assertion. It is an inaccurate statement with no factual basis at all. Indeed, the Complaint states the opposite; i.e, that Steve Schmitz never knew he had a brain injury or latent brain disease of any kind until it was diagnosed decades after he played football. *See, e.g.*, Complaint at ¶¶ 18, 22, 64-68, 129. In any event, neither Defendants-Appellants nor OACTA has shown that this case is one of public and great general interest, and the request for jurisdiction must, therefore, be denied.

## CONCLUSION

For all of the foregoing reasons, Plaintiffs-Appellees respectfully request that the Court reject all of the arguments marshaled by the Defendants-Appellants, deny their request for jurisdiction, and allow the case to return to the trial court for discovery and trial.

Dated: February 21, 2017

Respectfully Submitted,



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## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum in Opposition was filed on February 21, 2017 and served on that day upon counsel of record below via email and U.S. Mail.

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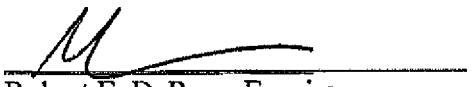

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